Supreme Court, U. S.
FILED
NOV 13 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-711

WESTERN AIRLINES, INC., *Petitioner*

v.

CONTINENTAL AIR LINES, INC., *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

CONTINENTAL AIR LINES, INC., *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in Continental Airlines, Inc. v. Civil Aeronautics Board on September 22, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit is printed in Appendix A hereto, and is reported at 519 F.2d 944 (D.C.Cir. 1975).

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit, printed in Appendix A here-

to, was entered on September 22, 1975. Petitioner filed a motion for stay of the mandate with that court on October 10, 1975. The Court has not yet ruled on the motion for a stay of the mandate.

The jurisdiction of this Court is invoked under 49 U.S.C. § 1486(f) and 28 U.S.C. § 1254(3).

THE QUESTIONS PRESENTED

1. Did the court below erroneously interpret the Federal Aviation Act of 1958 so as to impute an importance to competitive operating authority which the Congress did not intend?

2. In deciding this case and in attempting to control the course of the proceeding before the C.A.B. on remand, did the lower court usurp functions which Congress assigned the administrative agency?

3. Should the Supreme Court exercise its supervisory powers to review the lower court's judicial activism which is evident in its decision in this case?

CONSTITUTIONAL PROVISIONS STATUTES AND RULES INVOLVED

The principal statute involved is the Federal Aviation Act of 1958, as amended (the Act), 49 U.S.C. § 1301 *et seq.* Of particular importance are 49 U.S.C. § 1302 (Declaration of Policy), § 1371 (Certificate of Public Convenience and Necessity), and § 1486 (Judicial Review of Orders). Also involved in 5 U.S.C. § 706 (Scope of Review).

The pertinent text of these provisions is set forth in Appendix B.

STATEMENT OF THE CASE

This case began in 1967 with the filing of an application to the Civil Aeronautics Board (hereinafter called the Board or the CAB) by United Airlines for improved operating authority into San Diego. After several rounds of pleadings and CAB orders, the case was eventually set for hearing as the *Additional Service to San Diego Case.* The issues were limited to the consideration of "San Diego's largest east-west long-haul markets" (J.A. 33).[1] The markets involved were San Diego on the one hand, and New York/Newark, Washington/Baltimore, Chicago, and Denver on the other hand. In the course of this proceeding the CAB awarded new nonstop service authority in each of these markets, by removing operating restrictions from carriers which already had authority to serve them.

Among other things, the Board authorized Western Air Lines, Inc. (Western) to provide nonstop service in the San Diego-Denver market, as recommended by its Administrative Law Judge (ALJ). However, on a three to two vote, it disagreed with the ALJ's decision that Continental Air Lines, Inc. (Continental) should be given competitive nonstop authority between San Diego and Denver. The Board found that Western's proposed service would be "entirely adequate to meet the service needs of the market . . .", and expressed concern that competitive nonstop service would have an adverse financial impact on Western. In view of all the circumstances the Board found ". . . it more consistent with the goal of fostering sound economic conditions in air transportation—even at the cost of foregoing some

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[1] References to J.A. relate to the joint appendix submitted by the parties in the Court below.

undoubted beyond benefits a second carrier could provide—to certificate only Western at this time." (J.A. 41)

Although the awards to Western in the San Diego-Denver market and to another carrier in the other markets at issue were made final in June of 1970 (J.A. 65), final decision on the need for a second nonstop carrier between San Diego and Denver was deferred (J.A. 65).

After further economic study the Board issued, on March 23, 1971, a Supplemental Order on Reconsideration (Order 71-3-135, J.A. 67). This order for the first time attempted a completely new economic evaluation of the effect on the incumbent, Western, of a Continental entry into the San Diego-Denver market. It was later discovered that this analysis contained a major computational error (J.A. 79). Obviously, the Board was uncomfortable with the legal posture of the case at that stage. It remanded the proceeding to the same Administrative Law Judge who handled the original phase, expressing the need for more recent factual information (Order 71-4-112, April 16, 1971, J.A. 79).

The remanded phrase was essentially a new case focusing entirely on the questions of need for competitive service in the San Diego-Denver market and selection of a carrier.

Another complete hearing was held. The same ALJ again found that service by an additional carrier was required, and again selected Continental to provide it. On review, the Board again voted three to two to reverse the ALJ (Order 72-12-29, December 8, 1972, J.A. 83).

The Board's decision started out with a summary of the Supplemental I.D. and it then stated the general theme of the decision as follows:

> ". . . we have concluded that the public convenience and necessity would be better served at this time by not authorizing competitive service in this market [footnote omitted]. Our decision reflects the belief that during a period of lagging traffic growth and retrenchment within the industry, and during the subsequent period of recovery before an adequate upward trend has been assured (both generally and in markets which may be at issue), we must be more than unusually careful to avoid impeding the industry's opportunities for full recovery."
>
> * * *
>
> "There is little question that the San Diego-Denver route offers a potential for future certification of competition. However, in the circumstances of this case—where Western's service has been, and appears likely to be, reasonably responsive to the needs of the market, and where the traffic growth in the local San Diego-Denver market, and beyond markets which would support such local operations, show no strong sign of improvement—we believe it imprudent, on balance, to certificate a second nonstop carrier where competitive service is likely to produce, at best, only marginal financial results." (Order 72-12-29 at 2-3, J.A. 85, 86)

In this context, the Board went on to make a detailed point by point analysis of each of the ALJ's findings and to discuss its disagreement with them. (J.A. 83-98)

Petitions for reconsideration of the Board's order were denied on May 3, 1974 by a two to one vote. (Order 74-5-17, J.A. 100).

Continental then petitioned the court below, pursuant to 49 U.S.C. 1486, for judicial review of Orders 72-12-29 (J.A. 83) and 74-5-17/18 (J.A. 125).

On September 22, 1975 the lower court issued its opinion and judgment, remanding the case to the Board. In deciding the case the court passed over contentions by Continental that the Board's findings were inadequate and that the orders must be set aside for "failure to engage in reasoned decision-making." Rather, the court said:

> "We believe that this case is most naturally treated as presenting a question of the existence of substantial evidence to support the CAB's rejection of the statutory interest in the promotion of competition." (Appendix A, p. 13a, note 42)

The court construed the Federal Aviation Act of 1958 as mandating the certification of competition "when sufficient traffic exists to support [it]" (Appendix A, p. 19a); and found that the substantial evidence of record does not support the Board's finding that competitive service is not required in the San Diego-Denver market. The court also concluded that the failure to authorize competitive nonstop service "is not in accord with the public interest considerations set forth in § 102 of the Act" (Appendix A, p. 4a); and that "[t]he record before us contains ample evidence of, the need for competing nonstop service." (Appendix A, p. 30a) It included a pointed suggestion that Continental, rather than any other applicant, should be awarded the authority.

In order to maintain control of further proceedings the court directed the Board not to reopen the record for the purpose of taking additional evidence without

first petitioning the court to modify its mandate. If such a petition should be filed, the court specified that the Board should set forth "with particularity the matters involved and their relationship to the desirability and feasibility of implementing competition." (Appendix A, p. 30a)

As to selection of carrier for competitive authority, the court directed the Board to review the existing record and render a supplemental order either adopting the ALJ's determination that Continental should be selected "or setting forth its separate reasons for accepting or rejecting the ALJ's selection." (Appendix A, p. 31) Acceptance of these instructions would, of course, preclude any further hearing even on new applications for San Diego-Denver authority.

REASONS FOR GRANTING THE WRIT

1. The Court Below Has Interpreted the Federal Aviation Act in a Novel Way, Never Before Passed Upon by This or Any Other Court.

The lower court's decision rests entirely on a novel and erroneous interpretation of the Federal Aviation Act which no court has adopted before in the 38-year history of the Act and its predecessor, the Civil Aeronautics Act of 1938. For that reason this court has never had an opportunity to rule on such an interpretation. If the interpretation is allowed to stand, it will remove from the CAB power to control its own docket by requiring that priority of hearing be accorded to competitive route cases. Of even more significance it will have a serious impact on the substantive decisions in such cases by creating an almost unrebuttable presumption in favor of competition.

In essence the court below interpreted the Act to give "competition" preeminence over the other public intrest goals listed in section 102 of the Act [49 U.S.C. 1302].[2] Having established, in effect, a statutory presumption that competition is required by the public interest, the court went on to evaluate the evidence of record in this light, finding that there was not substantial evidence to overcome the presumption in favor of competition. In short, the court's interpretation of Section 102 of the Act is the cornerstone of the entire decision.

The court below developed its interpretation entirely from its reading of the legislative history of the Civil Aeronautics Act and a few early CAB decisions. It cited no court cases.

a. The Legislative History.

The legislative history of the Act dealing with competition reveals two distinct dialogues.

First, the primary motivating force behind enactment of the Civil Aeronautics Act was the desire of Congress to stabilize the air transportation industry by eliminating the unrestrained competition which was threatening to destroy the system at the time.[3] Thus, the regulatory system which Congress established may be characterized as one which was designed basically to control competition. We do not understand that the lower court disagrees with this premise.

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[2] The language of Section 102 has remained unchanged since 1938 although the original Civil Aeronautics Act of 1938 has been reenacted as the Federal Aviation Act of 1958.

[3] *See e.g.*, S.Rep.No. 1661, 75th Cong., 3rd Sess. (1938); H.R. Rep.No. 911, 75th Cong., 1st Sess. 19 (1937); 83 Cong.Rec. 6507 (1938); 83 Cong.Rec. 8890 (1937).

Second, the legislators were concerned that the entire air transportation system might fall into the hands of a few monopoly operators. The proposed act included a provision for the award of grandfather rights to the existing mail contract carriers and there was a fear that this would "freeze the present air service," and would create "a monopoly with the present contractors." (Testimony of Mr. Crowley, Solicitor Post Office Department, Hearings on S. 2 & S. 1760 Before the Subcommittee of the Senate Committee on Interstate Commerce, 75th Cong., 1st. Sess. 118 (1937)). There was also a concern that the Act's provisions, which exempted air carriers from the formerly applicable anti-trust laws, would permit monopoly systems to develop through consolidations or mergers. (Hearing testimony of Mr. Crowley, *supra* at 118; Letter from Mr. Farley, Postmaster General, Hearings on S. 2 & S. 1760, *supra* at 139; 83 Cong.Rec. 6728-6731 (1938)). In other words, some congressmen wanted to insure that the new regulatory statute would not create an air transportation system consisting of a few large carriers operating over basically non-competitive route systems.

This problem produced considerable colloquy in the debates, and drew several statements by Senator McCarran, the bill's author, and others to the effect that no such result was intended, and indeed, that there had been provisions built into the Act to preclude such developments. (83 Cong.Rec. 6729 (1938) remarks of Senator McCarran; 81 Cong.Rec. 9214 (1937) remarks of Senator Wheeler; 83 Cong.Rec. 6730 (1938) remarks of Senator Copeland).

The court below inferred from these broad, general anti-trust, anti-monopoly expressions of the legisla-

tors, a meaning beyond their true intention. It imputed to them a legislative "mandate" for the authorization of competitive nonstop service where sufficient traffic exists *on a particular route* to support competition *on that route.*

We have been able to find only one place in the legislative history of the Act in which a statement was made as to competition with regard to a particular route. That is the discussion at 83 Cong. Rec. 6852 (1938) cited by the lower court where reference is made to United Air Lines' service between Salt Lake City and Chicago (Appendix A, p. 16a). In context, it is obvious that this statement also arose out of a discussion of the possibility that the systems of existing carriers would be frozen by the "grandfather" clause of the Act. Senator McCarran was simply assuring Senator King that under the provisions of the Act there would be no such result. The "Authority" (the Civil Aeronautics Board) would be able to investigate the need for service on the route, and award competitive authority if it were required. In other words, the Act did not, by its terms, freeze a route into a non-competitive mold.

> ". . . we are trying to set up a non-political agency that will go into matters such as the one I have tried to illustrate. . ."
>
> "That is the object and purpose of the entire bill. It is not to say that any line may be 'frozen' nor that any line may be perpetuated, nor that any monopoly over any terrain may be established to the exclusion of the necessity which the public may present." (83 Cong.Rec. 6852.)

With this background it is apparent Congress contemplated that as to Section 102(d) the emphasis would be, not on the word "competition," but rather on the

remainder of the phrase: ". . . to the extent necessary to assure the sound development of an air transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense." To determine what extent is necessary, the CAB was established and given a "high degree of flexibility" to perform its functions under the Act.[4]

b. The C.A.B.'s Interpretation.

The court below also purports to find support in CAB decisions for its position that competition is entitled to a preeminent position in the Act's policy guidelines. It refers to statements in a few isolated cases which, by themselves, seem to lend credence to the findings.

However, when the pattern of Board decisions over the years is considered, the view is quite different. There has been overall increase in amount of competition among the airlines. But there have also been definite periods of remission of competitive awards as economic factors have dictated.

In its early years the Board was extremely cautious about awarding competitive authority, and in some cases it refused to make a competitive award because of the existence of adequate service.[5]

One of the Board's earliest impressions of its responsibility under the Act to permit competition to the extent necessary is found in *American Export,* 2 C.A.B.

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[4] 83 Cong. Rec. 6731 (1938).

16 at 31, which was cited by the lower court in support of its position. There the Board said:

> "We conclude that competition in air transportation is not mandatory, especially when considered in relation to any particular route or service. Clearly, Congress has left to the discretion of the Board the determination of whether or not competition in a particular area is necessary to assure the sound development of an appropriate air transportation system."

Under the circumstances of that case the Board awarded a competitive route; but the underlying theory of the case was obviously quite different from that imputed to it by the court. In another case reported in the same volume of the CAB Reports (2 C.A.B. 627 at 652) the Board refused to award competitive authority on another route partly because:

> ". . . the record does not indicate that the present service over Route No. 7 is inadequate or that the present operator thereof is incapable of accommodating the natural growth of air traffic which can be foreseen at this time. Under these conditions, the contention that there should be competing, duplicating services between two points merely to prevent one Government regulated carrier from dominating that field is unimpressive."

In the economic boom years of the mid 1950's, the Board set down a number of major route cases which were designed to reappraise the entire domestic route

[5] *E.g.*, National Air., et al., Daytona Beach-Jacksonville, 1 C.A.A. 612 (1940); American Export Air., Trans-Atlantic Service, 2 C.A.B. 16, 31 (1940); Northwest Air. et al., Additional Service to Canada, 2 C.A.B. 627, 652 (1941); Great Lakes Area Case, 8 C.A.B. 360, 382 (1947).

system.[6] It is to individual cases of this period which the lower court pointed primarily for statements in support of its views of the Board's obligations with regard to authorization of competitive service (Appendix A, p. 18a, notes 57, 58).

In the early cases in this group the Board indicated that the certification of significant amounts of new competition was a departure from the more cautious approach it had followed earlier. It noted that its new policy of "greater freedom" with regard to competitive route awards was justified by the general improvement in the overall strength of the industry; but even so, the Board recognized its obligation to control *excess* competition which could "bring uneconomical conditions and jeopardize the development of that sound system of air transportation which is the ultimate objective of the Act." *Southwest-Northeast Service Case,* 22 C.A.B. 52, 75 (1953). It found that the statute does not insist on competition on all routes or in all services. Rather, it is in the discretion of the Board to provide essential competition. *Railway Express, Airfreight Forwarder Application,* 27 C.A.B. 500, 534 (1958).

In the late 50's the Board reverted to a more cautious approach to competitive service. The *Southern Transcontinental Service Case,* 33 C.A.B. 701 (1961) was in-

[6] *E.g.*, Southwest-Northeast Service Case, 22 C.A.B. 52 (1955); New York-Chicago Service (Northwest Restriction), 23 C.A.B. 943 (1956); Syracuse-New York City Case, 24 C.A.B. 770 (1957); New York-Florida Case, 24 C.A.B. 94 (1956); Great Lakes-Southeast Service Case, 27 C.A.B. 829 (1958); Dallas to the West Service Case, Order on Reconsideration, 28 C.A.B. 590 (1959); New York-San Francisco Nonstop Service Case, 29 C.A.B. 811 (1959).

stituted in 1958 and, at that time it was considered to be the last major domestic route proceeding. That case was decided in 1961.

The Board awarded new competitive service in several of the larger markets involved in *Southern Transcontinental Case,* but it found that no new authority should be awarded in other markets. It stated:

> "In meeting these air service needs, however, we have done so in a manner which we believe will adequately meet the present and future air transportation requirements of the area while at the same time giving full recognition to the effect which the use of jet aircraft with its greatly expanded capacity will have on the needs of the individual markets and limiting duplicating service to those markets which we fully expect will produce a volume of traffic sufficient to support more than one carrier (33 C.A.B. at 710).

Thus, the Board used a major, general economic consideration affecting air transportation for the entire industry in the early 60's—the introduction of high capacity jet aircraft—as a moderating factor on competitive route awards. The Board went on to say:

> ". . . the mere fact that other markets of similar or even smaller size are authorized to receive service by more than one carrier is not dispositive of whether competitive service is required here. The extent of competition in any given market necessarily turns upon the facts and circumstances peculiar to that market." (33 C.A.B. at 715.)

From 1961 until 1968 the Board did not decide a significant, competitive, domestic route case (although it did commence a number of new cases after 1965 as general economic conditions improved). Rather, it concentrated its efforts on improving efficiency of local service carriers and on cases involving the authorization of first single-plane service,[7] in markets which formerly had only connecting or equipment interchange service.

In the latter category, the leading case of the period was probably the *Pacific Northwest-Southwest Service Investigation,* 46 C.A.B. 654 (1967), modified 46 C.A.B. 652 (1967). The case was commenced in 1964 but was not decided until April, 1967. The Board did authorize competitive service in one market—Denver-Kansas City—but the basic thrust of its decision was the award of first through-plane authority in markets which did not have it before. In overruling the finding of the Examiner that competitive routings by Braniff and Continental should be established on the major Pacific Northwest-Southwest routes at issue in the case, the Board stated:

> "While we agree that each of these carriers should be awarded Pacific Northwest-Southwest authority, we will establish two non-competitive routings . . .
>
> * * *
>
> This noncompetitive two-carrier pattern will insure provision of the needed service and full development of the traffic potential, but at the same time it will avoid the risk of so diluting the traffic as to interfere with the objective of providing on an economical basis the expedited long-haul services

[7] *See e.g.,* Mohawk Route 94 Realignment, 46 C.A.B. 111 (1967). Some of the improvement was accomplished by the elimination of excess competitive authority. Wyoming-South Dakota-Chicago Service, 36 C.A.B. 703, 752-53 (1962); Trans World Airlines, Service at Reading, 37 C.A.B. 227 (1962); American Airlines, Akron Service, 37 C.A.B. 606 (1963).

which are the primary need shown by this record." (46 C.A.B. at 667-68.)[8]

The mid-1960's were again a period of economic well-being, as the initial break-in period of the jets came to a close and the carriers began to realize the benefits of the increased productivity of the new equipment. The Board broke its period of relative inactivity in the routes area and began setting down a series of significant domestic route cases which resulted in a spate of competitive route awards in the years 1968 through 1970.[9] It was in this climate that the relatively simple *Additional Service to San Diego Case*, which is now before the court, was instituted.

By the time the ALJ's decision had been issued in 1969, the tide had already begun to ebb once more. In 1968 the domestic trunklines realized net profits of

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[8] The Board estimated that Braniff should develop in 1968 123,000 O&D and connecting passengers on its route, and that Continental should obtain 265,000 local and connecting passengers on its route. (46 C.A.B. at 668.) These markets were potentially as large or larger than the San Diego-Denver market at issue here.

[9] The more significant of these cases were: Southern Tier Competitive Nonstop Investigation, C.A.B. Docket 18257, Orders 69-7-135 (July 24, 1969), 69-9-11 (September 18, 1969); Service to Albuquerque Case, C.A.B. Docket 18586, Orders 69-7-136 (July 24, 1969), 69-9-10 (September 18, 1969); Twin Cities-Milwaukee Long-Haul Investigation, C.A.B. Docket 19097, Order 70-6-36 (June 4, 1970); Gulf States-Midwest Points Service Investigation, C.A.B. Dockets 17726 et al., Orders 69-5-25 (May 5, 1969), 69-9-18 (September 3, 1969); Dallas/Ft. Worth-Phoenix Nonstop Service Case, C.A.B. Docket 18579, Order 69-7-137 (July 24, 1969); Pacific Northwest-Southwest Service Investigation, Reopened, C.A.B. Dockets 15459 et al., Orders 69-4-11 (April 2, 1969), 69-10-163 (October 31, 1969).

about half the size of their 1967 boom year experience [10] and by the end of 1969, after the ALJ's I.D. in September, the profit figures had dropped by another 28 percent. In 1970, the year of the Board's first opinion and order, the trunkline industry experienced a net loss of over $100,000,000, the most severe in its history. It was this change which led the Board to note "the recent lag in nationwide traffic growth" (Order 70-4-46 at 4, J.A. 41) as an element which indicated that the Examiner's optimism for profitable operations between San Diego and Denver was unwarranted.

As the Board noted in a later order in this case (Order 74-5-17 at 4-5, J.A. 103, 104) the statement in Order 70-4-46 "sounded one of [the] earliest notes of caution with respect to declining traffic growth, the profit picture within the industry, and the hazards of overcapacity."

The discussion above, although somewhat tedious, is necessary to show that the CAB's view of its responsibilities with regard to the authorization of competitive service cannot be determined from separate statements of policy gleaned from individual cases. It must be

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[10] The profit information used in this paragraph has been taken directly from a publication entitled *Air Carrier Financial Statistics* which is prepared by the CAB's Bureau of Accounts and Statistics. It listed as one of the items of which the CAB takes official notice under the provisions of Rule 24(m) of its Rules of Practice (14 C.F.R. § 302.24(m). This publication shows the following net income [losses], after special items, for the domestic trunkline industry in the respective calendar year: 1960; $68,000; 1961, [$34,568,000]; 1962, $8,196,000; 1963, $13,117,000; 1964, $134,362,000; 1965, $221,889,000; 1966, $238,636,000; 1967, $244,475,000; 1968, $126,521,000; 1969, $90,592,000; 1970, [$100,412,000]; 1971, $48,182,000; 1972, $177,154,000; 1973, $142,930,000.

viewed in the light of the entire history of the Board. The court below failed to do this.

It was for the very purpose of meeting changing conditions in a rapidly developing airline system that the Congress gave the CAB a high degree of flexibility and discretion.[11] Therefore, it is not surprising that the Board's view of competition "to the extent necessary" changed from time to time, during the history of the Act, with the change in economic forces and the succession of different views which accompanied the departure and arrival of individual Board members.[12]

We submit that the court below was wrong in its interpretation of the Act to give competition a place of preeminence among the other policy guidelines.

Moreover, the court's interpretation, if allowed to stand, will have a profound effect on the substantive and procedural aspects of the Board's activity. Because of its limited capability to hear all matters submitted to its attention the Board has always been selective in setting applications for hearing; setting priorities on the basis of the general guidelines set forth in section 399.60 of its published Policy Statements [14 C.F.R. § 399.60]. Adherence to the theory behind the lower

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[11] Outagmie County v. C.A.B., 355 F.2d 900, 908 (7th Cir. 1966).

[12] Judge Prettyman's insight into the need for flexibility to meet change as expressed in Pinellas Broadcasting Co. v. F.C.C., 230 F.2d 204, 206 (D.C.Cir. 1956) is particularly applicable here:

> "... it is also true that the Commission's view of what is best in the public interest may change from time to time. Commissions themselves change, underlying philosophies differ, and experience often dictates changes ... All such matters are for Congress and the executive and their agencies. They are political in the high sense of that abused term. They are not for the judiciary."

court's interpretation of the Act in this case could force the Board to realign its priority system so as to give preference to cases involving competitive service, even over cases involving first certificated service, or those which might reduce federal subsidy payments or increase economy of operations.

Once a competitive route case is set down for hearing, the lower court's policy interpretation would establish a presumption favoring competitive service. This would shift the traditional burden of proof from the applicant in the case and onto the incumbent. The whole tenor of the proceeding would change. Instead of, as now, the applicant being faced with the obligation of proving that the public convenience and necessity require competition, and the incumbent having the burden of showing adverse economic impact on its operations, the incumbent would have to bear the entire burden of overcoming the presumption in favor of competition. Presumably, the quality of service provided by the incumbent would no longer be important. Neither would the negative impact of the loss of revenues over the route at issue on the remainder of the incumbent's system, since under the court's interpretation competition would be mandated "when sufficient traffic [in the relevant market] exists to support competition."

These are considerations of great moment which flow naturally from the lower court's interpretation of the Act in this case, and which merit the Supreme Court's attention. We respectfully urge the court to grant certiorari and to provide guidance for the CAB and the court below in the interests of all concerned with the area of regulation performed by the Board.

2. In Deciding This Case the Lower Court Usurped Functions Which Congress Assigned the Administrative Agency, and Its Decision Is in Conflict with Decisions of This Court Defining the Appropriate Scope of Review.

The scope of review by the lower court is controlled by section 1006(e) of the Federal Aviation Act [49 U.S.C. § 1486]. The Supreme Court has, in a number of opinions, specifically defined the scope of review under these or similar statutes.

The court below chose to test the Board's decision in this case on the basis of "substantial evidence," rather than on the adequacy of the findings.

We submit that a careful analysis of the entire opinion reveals that the court chose the "substantial evidence" test because it wanted to control the future course of the proceeding before the agency and to mandate a Board decision, without further hearings, favoring the award of competitive nonstop service between San Diego and Denver, and probably favoring the selection of Continental Air Lines to provide the services.

Thus, the court went well beyond a finding that substantial evidence does not support the Board's decision that competitive service is not required in the market. It also found that "[t]he record before us contains ample evidence of the need for competing nonstop service." (Appendix A, p. 30a). As to selection of carrier it noted that the issue ". . . has also been fully fleshed out in the previous hearing," (Appendix A, p. 30a) and that the ALJ had twice selected Continental over other applicants. Mentioning the advantages of selecting Continental, the court directed the Board to review the present record and to ". . . render a supplemental order either adopting the ALJ's determination

or setting forth its separate reasons for accepting or rejecting the ALJ's selection." (Appendix A, p. 31a).

As to further hearings the court stated:

> "To avoid any unnecessary delay, we note that if the Board should invoke the procedure of petitioning this court to modify its mandate to permit taking of additional evidence on the pendency of this appeal, it should set forth with particularity the matters involved and their relationship to the desireability and feasibility of implementing competition." (Appendix A, p. 30a)

This statement can only be read as a requirement that the Board seek court permission before holding further hearings. It also means that the court is reserving in itself the discretion to deny such permission.

The CAB is one of those administrative agencies established by Congress to maintain a regulatory grip on a dynamic industry.[13] Therefore, Congress gave it broad discretionary powers to adapt rules and policies to the demands of changing circumstances.[14] The flexibility and adaptability to meet the needs of a volatile and changing economy is an essential part of the office of a regulatory agency.[15] The delegation by Congress of the authority to act in accordance with the "public interest" or "public convenience and necessity" [49 U.S.C. § 1302] ". . . serves as a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative pol-

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[13] Outagmie County, Wis. v. C.A.B., 355 F.2d at 908.

[14] *Cf.* Permian Basin Area Rate Cases, 390 U.S. 747 (1968).

[15] American Trucking Ass'n v. A.T. & S.F.R. Co., 387 U.S. 397, 416 (1967).

icy." [16] Where a judgment is within an area which Congress had determined is best left to the discretion of an administrative agency, a reviewing court may not substitute its judgment for that of the agency.[17]

An examination of that lower court's opinion shows clearly that the lower court has substituted its judgment for that of the CAB, contrary to applicable decisions of the Supreme Court.

Moreover, the court has attempted to dictate the Board's decision on remand. This also was in conflict with applicable decisions of the Supreme Court.

The function of a reviewing court ends when an error of law—in this case lack of substantial evidence—is laid bare.[18] Once a case is remanded, the agency should have the flexibility to take such steps as are necessary to enforce the legislative policy committed to its charge.

> "Thus when a reviewing court concludes that an agency invested with broad discretion to fashion remedies has apparently abused that discretion by omitting a remedy justified in the court's view by the factual circumstances, remand to the agency for reconsideration, and not enlargement of the agency's order, is ordinarily the reviewing court's proper course." [19]

The reviewing court may not mandate the way in which an agency performs the legislative function it

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[16] F.C.C. v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940).

[17] S.E.C. v. Chenery Corp., 332 U.S. 194, 209 (1947); Burlington Truck Lines v. U.S., 371 U.S. 156, 169 (1962).

[18] F.P.C. v. Idaho Power Co., 344 U.S. 17, 20 (1952); F.C.C. v. Pottsville Broadcasting Co., *supra* note 16; F.T.C. v. Morton Salt Co., 334 U.S. 37 (1948); N.L.R.B. v. Food Store Employees, 417 U.S. 1 (1974).

[19] N.L.R.B. v. Food Store Employees, *supra*, 417 U.S. at 10.

has been delegated by Congress.[20] This holds true even though delay and hardship may result from the agency's procedures.[21]

> "... courts are not charged with general guardianship against all potential mischief in the complicated tasks of government. The present case makes timely the reminder that 'legislatures are ultimate guardians of the liberties and welfare of the people in quite as great degree as the courts' [cite omitted]. Congress which creates and sustains these agencies must be trusted to correct whatever defects experience may reveal. Interference by the courts is not conducive to the development of habits of responsibility in administrative agencies." [22]

We submit that the action of the lower court here, however well intentioned, is clearly in conflict with the *Pottsville* case and related cases decided by the Supreme Court.

While it may be argued that the lower court did not issue a mandamus as in *Pottsville* or that it did not actually modify an agency decision as in *Chenery* [23] or *Food Store Employees,*[24] it is apparent that court intends its decision to have that effect, and we must assume that the lower court will take further steps to impose its will on the agency. At the very least, the reservation in the court of power to approve or disapprove further hearings brings powerful pressures on the Board to comply with the Court's wishes.

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[20] F.C.C. v. Pottsville, *supra*, 309 U.S. at 145.

[21] *Id.* at 146.

[22] *Id.*

[23] S.E.C. v. Chenery Corp., *supra*.

[24] N.L.R.B. v. Food Store Employees, *supra*.

It seems clear from the opinion that the court would not permit further hearings on the question of need for competitive service. We may also assume that the court would not allow further hearings on selection of carrier until the Board complies with the direction to review the present record and ". . . render a supplemental order either adopting the ALJ's determination [on selection of Continental] or setting forth its separate reasons for accepting or rejecting the ALJ's selection." (Appendix A, p. 31a)

The court's constraints on additional hearings is particularly inappropriate in view of the very significant changes in circumstances which have occurred since the year ended June 30, 1971, the base year for traffic forecasting in this case, and even since May of 1974 when the most recent Board order in this case was issued. While the air transportation industry recovered briefly from the almost disastrous position it was in in 1970 and 1971, recent results indicate another serious economic downturn, principally because of rapidly escalating costs. Total operating expenses for the domestic trunkline systems increased by about 42 percent between calendar year 1971 and the end of calendar year 1974.[25] The inflationary spiral has caused all of the carriers to seek approval from the Board of fare increases during 1975.[26]

Circumstances involved in Continental's service have also changed. Footnote 12 of the court's opinion (Appendix A, p. 5a) noted several factors cited by the ALJ as favoring his selection of Continental. The low fare economy service which the ALJ found attractive has since been found to be illegal by the Board. Moreover, Continental no longer offers 3-2 seating in its economy and coach sections, but has reverted to the "less comfortable" 3-3 seating.

[25] Taken from C.A.B. published *Air Carrier Financial Statistics*. These materials are officially noticeable under C.A.B. regulations. 14 C.F.R. § 302.24(m).

[26] The cost increases are largely attributable to the secondary effect of actions by the foreign oil cartel which first created the fuel shortages mentioned by the Board in Order 74-5-17 (J.A. 100, 112).

The court noted Western's "brightened" financial situation in May of 1974, accepting a statement in Continental's brief that Western's rate of return for the preceding year had exceeded "the 12% level found 'reasonable' by the Board in its Domestic Passenger Fare Investigation." (Appendix A, p. 25a) Western's company records for the year ended September 30, 1975 indicate that the carrier's rate of return has slipped significantly below the "reasonable" level to 8.9%.

Company records also indicate that traffic in the San Diego-Denver market for the year ended September 30, 1975 has remained static as compared with the preceding year, and that load factors in the market have declined slightly.

These, of course, are all facts which are relevant to the present need for competitive service between Denver and San Diego and the issue of selection of carrier; but which are not now in the record.

There was also much controversy in the Board proceeding about the quality of service in the San Diego-Denver market as measured by Western's load factors; Continental and the ALJ claiming that they were much too high (J.A. 17-21), and the Board explaining why

they were reasonable (J.A. 87-89). All of this discussion is now superfluous because the Board has recently instituted a rulemaking proceeding for the express purpose of evaluating a new policy with regard to load factors in the light of today's economic climate (Advance Notice of Proposed Rulemaking PSDR-43, 40 F.R. 37048, August 25, 1975). Although the proceeding is directed primarily to establishing load factor standards for ratemaking purposes, there is no doubt that the result will have a carry-over impact on route proceedings.

Finally, there have been significant changes in the Board itself since the last order was issued in this case.

The ALJ has retired. Only two of the Board members who participated in the decisions under review remain on the Board—one from the majority and one from the minority. This means that, in order to get a quorum necessary to carry out the court's mandate to decide the case on the basis of the existing record, one or more Board members would be required to qualify himself by reading an extensive record which is now over five years old. Even after reviewing the record, the new members would apparently not have the prerogatives normally available to them in a case of first impression. They would be constrained to vote in accordance with the directions of the court's mandate.

3. The Court Below Has So Far Departed from the Accepted and Usual Course of Judicial Proceedings as To Require Supervision and Guidance by the Supreme Court.

The lower court's decision in this case is the most recent product of several years of "judicial activism" by the D.C. Circuit toward actions of administrative agencies. This "activism" is well known, and has drawn

the attention of several legal scholars.[27] Some of the comment is favorable,[28] and other is adverse;[29] but it cannot be denied that the court's position has been recognized as an important phenomenon.

The activist stance is relatively recent and represents a radical change in the D.C. Circuit's prior view as to its relationship with the administrative agencies.

The court's former view was in line with the Supreme Court's decisions in *Pottsville* and *Chenery* to the effect that the courts must not assume what is essentially a function of the administrative agency. This view is exemplified by the following quote from Judge Prettyman's opinion in *Pinellas Broadcasting Co.* v. *F.C.C.*, 230 F.2d 204, 206 (D.C. Cir. 1956):

> "The controversy is in an area into which the courts are seldom justified in intruding. The selection of an awardee from among several qualified applicants is basically a matter of judgment, often difficult and delicate, entrusted by the Congress to the administrative agency. The decisive factors in comparable selections may well vary; sometimes one applicant is superior to another in one respect, whereas in another case one applicant may be superior to its rivals in another feature. And it is also true that the Commission's view of what is best in the public interest may change from time to time. Commissions themselves change, underlying philosophies differ, and experience often dic-

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[27] *See e.g.*, Schotland, *Scope of Review of Administrative Action—Remarks Before the D.C. Circuit Judicial Conference*, 34 Fed.Bar 54 (1974).

[28] Paper, *Judicial Scrutiny of the F.C.C.: The Illusion of Usurpation*, 52 Bos.U.L.Rev. 659 (1972).

[29] Gardner and Greenberger, *Judicial Review of Administrative Action and Responsible Government*, 63 Geo.L.J. 7 (1974).

> tates changes. Two diametrically opposite schools of thought in respect to the public welfare may both be rational; e.g., both free trade and protective tariff are rational positions. All such matters are for the Congress and the executive and their agencies. They are political, in the high sense of that abused term. They are not for the judiciary."

This should be compared with the court's more recent position as expressed by Judge Leventhal in *International Harvester Co.* v. *Ruckelshaus,* 478 F.2d 615, 648 (D.C.Cir. 1973):

> "It is with even more diffidence that a court concludes that the law, as judicially construed, requires a different approach from that taken by an official or agency with technical expertise. Yet this is an inescapable aspect of the judicial condition, though we stay mindful of the overreaching consideration that a court's role on judicial review embraces that of a constructive cooperation with the agency involved in furtherance of the public interest."

The Prettyman court would not have tried to direct the course of CAB proceedings on remand in a case of this nature, or to interfere with the Board's powers to select a carrier in a route proceeding.[30] The Leventhal court in the instant case has found that the substantial evidence requires competitive service in a specific market; has indicated a strong preference for a particular airline to provide the competitive service; and has directed the Board to review the existing record and render a supplemental order either adopting the ALJ's

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[30] *See:* State Airlines v. C.A.B., 174 F.2d 510, 518 (D.C.Cir. 1949), *rev'd on other grounds,* 338 U.S. 572 (1950).

decision that the preferred carrier be selected, or setting forth reasons why not.

The new "activism" is founded on the concept adopted by Judge Leventhal for the first time in *Niagara Mohawk Power Corp.* v. *F.P.C.*[31] Judge Leventhal expanded on the principle in *Greater Boston Television* v. *F.C.C.,*[32] which has since become the basis for the development of a substantial body of case law, all in the District of Columbia Circuit.[33] Although some reservations have been expressed by Judges of the Court about the propriety and feasibility of the expanded scope of review,[34] it is firmly embedded in the case law of the Circuit, and will remain so until review by the Supreme Court.

Under the D.C. Circuit's "partnership" theory the court on review is entitled to substitute its judgment for that of the agency, and that is exactly what has been done here.

So far as we know, the Supreme Court has not considered the new activism or the "partnership" theory. Moreover, we have been unable to uncover any decisions in other circuits which have adopted the "part-

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[31] 379 F.2d 153, 160 (D.C.Cir.1967), *cert.den.* 393 U.S. 1085.

[32] 444 F.2d 841 (D.C.Cir. 1970), *cert.den.* 403 U.S. 923 (1971).

[33] *E.g.*, Alabama Power Co. v. F.P.C., 450 F.2d 716 (D.C. Cir. 1971); City of Lafayette, La. v. S.E.C., 454 F.2d 941 (D.C.Cir. 1971); Natural Resources Defense Council v. Morton, 458 F.2d 827 (D.C.Cir. 1972). *See also* the dissent of Judge Leventhal in Sindicato Puertoriqueno de Trabajadores v. Hodgson, 448 F.2d 1161 (D.C.Cir. 1971), *cert.den.* 404 U.S. 1025, where he argues for a more flexible scope of review than adopted by the majority.

[34] See: Judge Robb's dissent in Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584, 598 (D.C.Cir. 1971), and statement of Judge McGowan in Union of Concerned Scientists v. A.E.C., 499 F.2d 1069, 1094 (D.C.Cir. 1974).

nership" theory. In fact, the prevailing law in other circuits is consistently the view that a court shall not substitute its judgment for that of the agency.[35]

Since the D.C. Circuit reviews many more administrative cases than other circuits, its partnership theory is bound to be picked up elsewhere as substantive law. Therefore, the ideal time for review and guidance by the Supreme Court is now, while the concept resides wholly in the District of Columbia.

The question is undoubtedly an important one. It is important from the standpoint of the parties whose rights are determined by administrative action. It is important in terms of the quality of the work performed by the administrative agencies.[36] But it is also extremely important in the context of today's overcrowded court dockets. As Judge McGowan stated in *Union of Concerned Scientists* v. *A.E.C.*, 499 F.2d 1069, 1094 (D.C.Cir. 1974):

> "it is patent from the foregoing that despite the procedural nature of the issues raised, we have had to deal with subject matter ranging far beyond the

[35] *E.g.*, Colonial Stores, Inc. v. F.T.C., 450 F.2d 733 (5th Cir. 1971); Chrysler Corp. v. Dep't of Transp., 472 F.2d 659 (6th Cir. 1972); Why? Ass'n v. Burns, 372 F.Supp. 223 (Conn. 1974).

[36] *See* Pottsville, 309 U.S. at 146, where the Court said: "Interference by the courts is not conducive to the development of habits of responsibility in administrative agencies."

> normal ken of judges. *This case is only one among many such these days, and thus, suggests the extraordinary tasks that the seemingly endless statutory proliferation of judicial review of agency action is imposing on the federal courts.* How meaningful judicial review on this scale can be over any sustained period of time, at least if not invariably invoked with an acute sense of responsibility and a willingness to recognize that many of these more esoteric battles must largely be won or lost at the agency level, is problematic. (emphasis supplied)

One commentator points out that, in 1973, the D.C. Circuit remanded for further proceedings 61 percent of the administrative cases it reviewed.[37] It is obvious that court burden and delay will increase as the court injects itself more and more into its "partnership" with the agencies.

The time is ripe for the Supreme Court to exercise its power of supervision. All of the meaningful decisions on scope of review were issued in the late 1940's and early 1950's shortly after adoption of the Administrative Procedure Act. None of them anticipated the "broad judicial activism" now being practiced in the D.C. Circuit. The lower court, as well as the courts of other circuits, needs fresh guidance.

[37] Gardner and Greenberger, *supra* note 16, at 37.

CONCLUSION

For the reasons aforesaid, petitioner respectfully requests that this honorable court grant this Petition for Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

Opinion of the United States Court of Appeals for the District of Columbia Circuit

No. 74-1651

CONTINENTAL AIR LINES, INC.

v.

CIVIL AERONAUTICS BOARD

UNITED STATES COURT OF APPEALS,
DISTRICT OF COLUMBIA CIRCUIT

No 74-1651

CONTINENTAL AIR LINES, INC., *Petitioner,*

v

CIVIL AERONAUTICS BOARD, *Respondent,*

Western Air Lines, Inc., Hughes Air Corporation, d/b/a Hughes Airwest United Air Lines, Inc., Trans World Air Lines, Inc., of Kansas City, Missouri and Chamber of Commerce of Greater Kansas City, City and County of Denver, Colorado, Public Utilities Commission of the State of Colorado, San Diego Unified Port District, the City of San Diego, San Diego Chamber of Commerce, Intervenors.

Argued April 11, 1975

Decided Sept. 22, 1975

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Before WRIGHT and LEVENTHAL, *Circuit Judges, and* WEIGEL,* United States District Judge for the Northern District of California.

Opinion for the Court filed by Circuit Judge Leventhal

LEVENTHAL, Circuit Judge:

Continental Air Lines, Inc. petitions for review of two orders of the Civil Aeronautics Board (CAB) entered in the Board's Additional Service to San Diego Case. The Challenged orders—Order 72-12-29, December 8, 1972, and Order 74-5-17, May 3, 1974—rejected the recommendations of the Administrative Law Judge (ALJ) that competitive nonstop authority be certificated between San Diego and Denver.[1] The ALJ had selected Continental to provide the competitive service.

Petitioner contends that the Board's order should be set aside on the ground that the CAB "failed to give adequate weight to the statutory mandate favoring competition" and "failed to engage in reasoned decision-making."[2] The Board responds that its orders were adequately supported by the need for caution at a time when the industry was "plagued by retrenchment and lagging traffic growth" and by the "crucial problem of diminished fuel supplies."[3]

We find that, as a general matter, § 102 of the Federal Aviation Act requires the Board to foster competition as a means of enhancing the development and improvement of air transportation service on routes generating sufficient traffic to support competing carriers.[4] We are cogni-

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* Sitting by designation pursuant to 28 U.S.C. § 292(d).

[1] The challenged orders are set forth at JA 83-98 and JA 100-24, respectively.

[2] Brief for Petitioner at 18, 31.

[3] Order 74-5-17, May 3, 1974, at 2, 13, JA 101, 112.

[4] *See* text accompanying notes 44-61 *infra*.

Section 102 of the Federal Aviation Act, 49 U.S.C. § 1302 (1970),

zant that in some circumstances the other considerations set forth in § 102 may conflict with and predominate over the public interest in competition.[5] The Board urges in effect that here the need to foster sound economic conditions in view of the industry's financial posture and the fuel situation overrides the benefits of competition. After a careful examination of the record, we conclude that the Board's position is not supported by substantial evidence

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states:

§ 1302. Consideration of matters in public interest by Board.

In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The promotion of safety in air commerce; and

(f) The promotion, encouragement, and development of civil aeronautics. (Pub.L. 85-726, Title I, § 102. Aug. 23, 1958, 72 Stat. 740.)

[5] *See United States v. CAB*, —— U.S.App.D.C. ——, ——, 511 F.2d 1315, 1322 (1975) ("the statute would appear to contemplate that the factor of competition could be outweighed by one or more of the other factors").

and that its rejection of competitive nonstop service in the San Diego Denver market is not in accord with the public interest considerations set forth in § 102 of the Act. Accordingly, we remand the case for further proceedings consistent with Part IV of this opinion.

I. *Background*

We begin with a summary of the seven years of administrative proceedings culminating in the orders under review.

The challenge orders are the last of a series of CAB rulings entered in the Additional Service to San Diego Case. That proceeding arose out of an application filed by United Air Lines on January 12, 1967, requesting permission to provide nonstop service in several San Diego markets.[6] On May 26, 1967, the CAB issued a show cause order which rejected United's San Diego-Denver nonstop request, but proposed to give United nonstop authorization for the San Diego-New York and San Diego-Chicago routes.[7] In response to the City of Denver's petition for reconsideration, the Board *sua sponte* issued a second order to show cause why Western Air Lines, the primary San Diego-Denver carrier, should not be permitted to provide nonstop service in that market.[8] The Board's proposals prompted numerous objections and competitive filings from other airlines. By order of April 3, 1968, the CAB instituted the Additional Service to San Diego Case, setting a consolidated hearing on applications for nonstop

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[6] *See* Initial Decision of Hyman Goldberg, Hearing Examiner, September 4, 1969, at 2, JA 373.

[7] Order to Show Cause, Order No. E-25202, May 26, 1967, at 4, JA 24.

[8] Order to Show Cause, Order No. E-25727, September 22, 1967, at 1 & n. 1, JA 27 & n. 1.

authority between San Diego and New York/Newark, Washington/Baltimore, Chicago and Denver.[9]

Following the submission of briefs by numerous carriers and local groups and three days of hearings, the ALJ issued his initial decision on September 4, 1969. The ALJ recommended that competitive nonstop authority be authorized in all four markets under consideration. With regard to the San Diego-Denver market, he adopted the Bureau of Operating Rights' forecast that there would be "not less than 100,335 passengers in 1970." Based on this "conservative" estimate he found "ample traffic to support two carriers on an economic basis without regard to the support of through traffic flowing over the route."[10] The ALJ selected Western and Continental to provide the competing nonstop service. Western was a "logic choice" because it carried the great bulk of the San Diego-Denver passengers on its one stop flights routed via Phoenix.[11] Continental was chosen ahead of United, TWA and Air West as the second carrier because of United's past "record of neglect and indifference" toward the market and because of Continental's superior proposed pattern of service; attractive fare schedules; substantial beyond market benefits; and history as "an extremely vigorous, aggressive, and efficient carrier."[12]

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[9] Order No. E-26608, April 3, 1968, at 4, JA 33.

[10] *See* Initial Decision, *supra* note 6, at 64 & n. 115, JA 435 & n. 115. The ALJ deemed the Bureau's forecast conservative because its base year traffic figures did not include "on-line connecting passengers" and its stimulation factor—growth attributed to new, improved service—did not take account of Continental's attractive fare proposals.

[11] *See id.* at 65, JA 436.

[12] *See id.* at 66-76, JA 437-47.

Continental proposed three "conveniently timed" round trips a day and offered "not only first-class and coach service, at substantial reductions in fares, but also . . . the economy service for which the carrier is well-known, at considerably reduced fare levels." In

The CAB execised its right of discretionary review of the ALJ initial decision, issuing its opinion on April 9, 1970.[13] The Board adopted the ALJ's findings regarding the need for competitive nonstop service in the Chicago, New York/Newark, and Washington/Baltimore markets but decided, by a vote of 3-2, to certificate only one nonstop carrier, Western, in the San Diego-Denver market. This departure from the ALJ's determination rested primarily on the majority's view that "the examiner's forecast may be too optimistic" given "the recent lag in nationwide traffic growth."[14] Although the CAB noted that a competitive authorization would provide a spur to better service and significant benefits to beyond segment markets, it concluded that Western's possible "sizable operating loss if competitive service is instituted" in conjunction with the adequacy of Western's proposed service to meet the needs of the market rendered a denial of a competing nonstop carrier certification "more consistent with the goal of fostering sound economic conditions in air transportation. . . ."[15] The dissenting Board members

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contrast to TWA, it offered 3-2 seating in coach and economy sections instead of less comfortable 3-3 seating. Continental's selection would also provide a substantial number of passengers in four beyond markets either first single-plane or first single-carrier service —a factor of prime importance. The ALJ considered Continental's efficiency and agressiveness important in view of Western's "long-entrenched" position in the market. Finally, in addition to service, scheduling, and beyond market advantages over TWA, Continental was given a plus as a far smaller carrier to which the award would "be more important" than to TWA. Air West was passed over because its shaky financial position made it doubtful that it could offer Western "effective, dynamic competition."

[13] *See* 14 CFR §§ 385.50-.54 (1975) (delineating the discretionary review procedure).

[14] Opinion 70-4-46, April 9, 1970, at 2, JA 39, 41.

[15] *Id.* at 4 & n. 6, JA 41 & n. 6. The Board also noted that the examiner had relied in part on Western receiving new revenue from

emphasized that the projection of 100,335 passengers (275 per day) in 1970 was "a very conservative estimate" which did not include either "true San Diego passengers (because they traveled from Los Angeles to San Diego by surface transportation or intrastate airlines) or "the substantial number of passengers carried between these points who will move beyond Denver to points on the routes of both Western and Continental."[16] In addition, the dissent noted that within the past year the Board had made grants of competitive nonstop service in a number of substantially smaller markets.[17]

A number of parties, including Continental sought reconsideration of the Board's determination. Petitioner claimed that the majority lacked substantial evidence to support its determination that the traffic forecast of the ALJ and the Bureau of Operating Rights was too optimistic. It noted that the lag in national traffic had not affected

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San Diego-New York/Newark and San Diego-Washington/Baltimore awards which the Board decided to grant to United. *Id.* at n. 7.

[16] Concurring and Dissenting Opinion of Members Murphy and Minetti in Opinion 70-4-46, at 1, JA 49.

[17] *Id.* at 1-2 & n. 1, JA 49-50 & n. 1. A partial list of such awards showing O & D plus interline connecting traffic projected for the forecast year included:

Houston-Seattle/Portland	150
Denver-San Antonio	194
Denver-Portland	220
Salt Lake City-Seattle	222
Salt Lake City-Portland	138
Houston-St. Louis	272
San Antonio-Washington	176-224
New Orleans-Tampa (3 carriers)	206
Houston-Miami	280
Dallas-Tampa	158
Albuquerque-Las Vegas	206
Albuquerque-San Francisco	190-330
Memphis-New Orleans	246

the market at issue—the San Diego-Denver market had grown 34% between 1967 and 1968 and both San Diego and Denver experienced an increase in total traffic well in excess of the national average. Continental reinforced its argument by pointing out that the traffic estimates of three other carriers paralleled or exceeded the ALJ's forecast and the ALJ's figure was significantly understated because of the factors noted by the dissenting members.[18]

The CAB, by order of June 5, 1970, deferred action on the petitions to reconsider certification of a second nonstop carrier between San Diego and Denver. In its Supplemental Opinion and Order on Reconsideration of March 23, 1971, the Board, by an identical 3-2 vote, reaffirmed its previous denial of competitive service. The majority conceded that the San Diego-Denver market "maintained a healthy growth rate in calendar year 1968," but argued that 1969 traffic data demonstrated that "the market is by no means an exception to the nationwide slowdown."[19] Using more recent traffic figures and a 1971 forecast year, the majority calculated that "Continental certification would produce an operating loss of about $84,000 for Western in 1971. . . ." The Board concluded that harm to Western "at a difficult period for the industry as a whole and Western in particular" outweighed the "significant

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[18] Petition of Continental Air Lines, Inc., for Reconsideration of Order 70-4-46, May 4, 1970, at 2, 5-6, JA 211, 214-15.

Party	Annual	Daily
Air West	98,870	271
Continental	101,222	277
TWA	117,240	320
Western	94,216	258
Bureau	100,335	275

Since Western's forecast assumed monopoly service, it would have to be increased to obtain an estimate for the size of a competitive market.

[19] Order 71-3-135, March 23, 1971, at 2, JA 68.

factors" favoring certification such as substantial beyond segment benefits and profitable operation for Continental.[20] The dissenters claimed that "[t]here can be no serious question . . . that this market is large enough to support competition," emphasizing that the majority projection for 1971 yielded a larger traffic volume than the ALJ had found sufficient to support competition using a 1970 target year.[21] They found that the possibility of a temporary loss by Western in 1971 was overshadowed by public benefits from improved service which Continental's competitive flights would provide in the San Diego-Denver market and in other related markets.[22]

Shortly after issuance of its supplemental opinion, the Board discovered that its financial calculations had erroneously rested on fiscal rather than calendar 1971 traffic estimates and consequently had underforecast 1971 traffic volume. Corrected estimates revealed that, in competition with Continental, Western's 1971 profits would range from slightly below to somewhat above the break-even level. The CAB stated: "These revised figures render extremely close the balance of decisional criteria—harm to Western under existing economic conditions weighed against public benefit factors favoring competition and improved beyond service—in determining whether such competition should be authorized." Under these circumstances, the Board, by order of April 16, 1971, remanded the competi-

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[20] *Id.* at 4-5, JA 70-71.

[21] Dissenting Opinion of Members Murphy and Minetti in Order 71-3-135, at 1, JA 72. The majority forecasted 103,124 passengers in 1971 as compared with the ALJ's 1970 forecast of 100,335. *See* Order 71-3-135, March 23, 1971, Appendix A, at 2, JA 78.

[22] Dissenting Opinion, *supra* note 21, at 4, JA 75. The dissenters also challenged the majority's loss projection on the basis of its underestimation of passengers by ignoring surface and intrastate Los Angeles-San Diego traffic and using atypical 1969 growth rate figures and its overestimation of costs.

tion question to the ALJ for an analysis of "the most recent traffic and cost data and Western's actual experience with nonstop service in the market." [23]

The remand proceeding culminated in a 92-page Supplemental Initial Decision issued on March 20, 1972. The decision found a second nonstop carrier warranted by the size of the market in the 1972 and 1973 forecast years, the serious deficiencies and omissions in Western's service, and Western's ability "to achieve a substantial operating profit" in each of the forecast years in competition with another nonstop carrier.[24] The ALJ accepted as reasonable the Bureau of Operating Right's traffic estimate of 118,520 passengers in 1972 and 127,409 in 1973 and its related projection of an operating profit for Western of $417,000 in 1972 and $325,000 in 1973.[25] The supplemental decision faulted Western's San Diego-Denver service for scheduling inadequacies and high load factors.[26] The ALJ selected Continental to compete with Western for substantially the same reasons contained in his initial decision.[27]

The Board, 3-2, again reversed the ALJ and declined to authorize competitive nonstop service. The majority

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[23] Order of Remand, Order 71-4-112, April 16, 1971, at 1, JA 79.

[24] Supplemental Initial Decision of Hyman Goldberg, Hearing Examiner, March 20, 1972, at 55, JA 585.

[25] *Id.* at 56, 75, JA 586, 605.

[26] *See id.* at 59-65, JA 589-95. Among the "many serious inadequacies" were findings that the carrier did not provide prime time departures in both directions, that there were significant service gaps, that Western served the market only as part of long-haul flights, and that load factors indicated "unresponsive scheduling on Western's part." Although Western had proposed to provide three nonstop round trips, it had never flown more than two daily nonstop round trips.

[27] *See id.* at 77, JA 607-17; note 12 *supra*.

members expressed concern that, "during a period of lagging traffic growth and retrenchment within the industry, and during the subsequent period of recovery before an adequate upward trend has been assured," the agency "must be more than usually careful to avoid impeding the industry's opportunities for full recovery." [28] It concluded that certification of competition would be imprudent since Western's service had been "reasonably responsive to the needs of the market" and since competitive service was "likely to produce, at best, only marginal financial results." [29] The Board found the ALJ's and the Bureau's traffic forecast "too optimistic" and set forth a number of adjustments in their growth and stimulation percentages which reduced the 1973 traffic estimates by 29,000 passengers.[30] Although the Board made no profit or loss calculations of its own, it concluded that "the prospect for profitable two-carrier operation is tenuous at this time." [31]

Continental's detailed petition for reconsideration took issue *inter alia* with the Board's adjustments to the ALJ's traffic forecast. In particular, it questioned the majority members' reliance on experience during recession years to support its forecast of a 3 percent growth rate for 1972 and 1973, in view of the Board's earlier finding that the recession was a "temporary phenomenon." [32] As proof of the Board's error, Continental noted that, as a result of substantial growth, Western's traffic figures revealed that the market was significantly larger at the end of

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[28] Opinion 72-12-29, December 8, 1972, at 2, JA 85.

[29] *See id.* at 3, JA 86.

[30] *See id.* at 8-10, JA 91-93.

[31] *Id.* at 8, JA 91.

[32] Petition of Continental Air Lines, Inc. for Reconsideration of Order 72-12-29, January 29, 1973, at 20, JA 313, *quoting* Domestic Passenger Fare Investigation, Order 71-4-54, at 28.

1972 than the Board had predicted it would be a year later.[33]

On May 3, 1974, fifteen months after the opinion following the remand, the Board issued an Opinion and Order on Reconsideration reaffirming, by a 2-1 vote, its denial of a competitive nonstop certification. This final opinion in these extended proceedings reiterates the Board's "policy of caution" and expresses its "resolve to avoid making unnecessary awards of competitive authority on routes which are adequately served.[34] Noting recent traffic growth data, the Board conceded "that the prospects for profitable competitive operations are far stronger than earlier believed" and that "competitive service would be more profitable than originally anticipated—although not as profitable as Continental claims." [35] However, without further explication, it stated that "the Board's original decision did not turn on profitability alone. . . ." [36] Despite the improved financial outlook for competition and the benefits it offered, the Board determined that, given the general state of the industry and the recent onset of the fuel shortage, "a competitive authorization is unnecessary and undesirable at this time." [37]

The dissenting member emphasized that traffic data indicated that the ALJ's 1973 forecasts "were on sound ground, indeed if anything conservative" and that there would likely be "well over 150,000 annual passengers" for fiscal 1975, the earliest possible first year of competitive operations.[38] He commented: "Overall, it is hard to

[33] Petition, *supra note* 32, at 20, JA 313.

[34] Opinion and Order on Reconsideration, Order 74-5-17, May 3, 1974, at 2, JA 101.

[35] *Id.* at 3, 13, JA 102, 112.

[36] *Id.* at 3, JA 102.

[37] *Id.* at 8, JA 107.

[38] Dissent of Member Minetti in Order 74-5-17, at 2, JA 121.

avoid the impression that the majority is not really interested in whether competitive service would be profitable, and has effectively eliminated this as a decisional factor." [39] Nor did he find any warrant for a denial of competitive service in the fuel situation. In view of Western's scheduled four and a half nonstop roundtrips, the dissent noted that "competitive service in this market is possible today without materially increasing overall jet fuel consumption or reducing service in other, perhaps more essential markets." [40]

On June 25, 1974, Continental filed a petition for review of the Board's 1972 order and its 1974 order on reconsideration.[41]

II. *Competition and the Public Interest Standard of the Federal Aviation Act*

Continental urges that the challenged orders must be set aside in part because the Board failed to give adequate weight to the governing statute's mandate favoring competition.[42] Petitioner's contention rests both on an as-

[39] *Id.* at 3 n. 4, JA 122 n. 4.

[40] *Id.* at 4-5, JA 123-24.

[41] The following carriers and local representatives intervened in the action: Western Air Lines, Inc., Hughes Air Corp. d/b/a Hughes Air West, United Air Lines, Inc., Trans World Airlines, Inc., City of Kansas City, Missouri and Chamber of Commerce of Greater Kansas City, City and County of Denver, Colorado, Public Utilities Commission of the State of Colorado, San Diego Unified Port District, The City of San Diego, and the San Diego Chamber of Commerce. Western filed a brief in support of the CAB and the local interests filed briefs urging competitive service. The court granted leave to the Department of Justice to file an *amicus* brief. *Amicus* supported petitioner's challenge to the CAB's order.

[42] Brief for Petitioner at 18-31. Petitioner also argued that the Board's orders must be set aside for failure to engage in reasoned decisionmaking. *Id.* at 3-48. We believe that this case is most naturally treated as presenting a question of the existence of sub-

sessment of the general importance of competition in the statutory scheme and an analysis of the Board's treatment of the record in view of that scheme. As shall be seen, these two aspects of petitioner's argument implicate distinct questions of statutory interpretation and substantial evidence. We turn first to an examination of the role of competition, in order to develop a framework for evaluating the record to determine whether the Board's decision is supported by substantial evidence and evinces a "fidelity to the functions assigned to the regulatory agency by the Congress." [43]

"Competition to the extent necessary" is one of the six public interest factors set forth in § 102 of the Federal Aviation Act to guide the CAB "[i]n the exercise and performance of its powers and duties." [44] The parties present divergent interpretations of § 102 and its competition subsection, § 102(d). Continental contends that the Act creates "a 'strong presumption' in favor of competition." [45] The CAB's brief argues that the statute "contemplates that competition may or may not be 'necessary' " and that competition is not *per se* favored "where it endangers other policy goals in the public interest, such as the achievement of efficient, economical service or the fostering of sound economy of operations." [46] Intervenor Western opines that in view of the origin of the Act "it is apparent Congress contemplated that as to Section

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stantial evidence to support the CAB's rejection of the statutory interest in the promotion of competition.

[43] *See Public Service Comm'n, State of N. Y. v. FPC (Texas Gulf Coast Area Rate Cases)*, 159 U.S.App.D.C. 172, 208-09, 487 F.2d 1043, 1079-80 (1973), *vacated and remanded sub nom. Shell Oil Co. v. Public Service Comm'n*, 417 U.S. 964, 94 S.Ct. 3166, 41 L.Ed.2d 1136 (1974).

[44] Section 102 is set forth at note 4 *supra*.

[45] Reply Brief for Petitioner at 2.

[46] Brief for Respondent at 20, 22.

102(d) the emphasis would be, not on the word 'competition,' but on the remainder of the phrase: to the extent necessary to assure the sound development of an air transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense." [47] An examination of the origins of the statute and of its "contemporaneous construction" by persons "charged with the responsibility of setting its machinery in motion" [48] clarifies the intended meaning of § 102(d) and the relationship between competition and the other public interest factors.

Congress first established a comprehensive system for regulation of air transportation through the Civil Aeronautics Act of 1938.[49] The legislative history of that act makes clear that the statute was designed to correct the abuses of unrestrained competition among carriers. The Senate Report on the proposed legislation warned that "[c]ompetition among air carriers is being carried to an extreme, which tends to jeopardize and render unsafe" air transportation and urged the "immediate enactment" of the bill to "promote an orderly development of our Nation's civil aeronautics" and to "prevent the spread of bad practices and of destructive and wasteful tactics resulting from the intense competition now existing within the air-carrier industry." [50] In floor debates, Congressman Randolph cited "rate war, cutthroat devices, and destruc-

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[47] Brief for Intervenor Western Air Lines at 30.

[48] *Power Reactor Development Co.* v. *International Union of Electrical Workers*, 367 U.S. 396, 408, 81 S.Ct. 1529, 1535, 6 L.Ed.2d 924 (1961), *quoting Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315, 53 S.Ct. 350, 77 L.Ed. 796 (1933).

[49] 52 Stat. 973 (1938).

[50] *S.Rep.No.* 1661, 75th Cong., 3d Sess. 2 (1938); *see H.R.Rep.No.* 911, 75th Cong., 1st Sess. 19 (1937).

tive and wasteful practices" as evidence that "[t]he industry has reached the point where unbridled and unregulated competition is a public menace."[51]

However, Congress made it clear that while it was moving to safeguard against the excesses of destructive and unrestrained competition, it was in favor of the competitive principle and opposed to a policy of monopoly. In the debates, Senator McCarran stressed that the Act established a "nonpolitical agency" that would focus on the public interest of avoiding destructive competition where *e. g.*, United Air Lines already serves Chicago to Salt Lake City, and the agency rejects another applicant who wants to serve the route, "because if you do both lines will fail. . . ." He added:

> [This] is not to say that any line may be "frozen" nor that any line may be perpetuated, nor that any monopoly over any terrain may be established to the exclusion of the necessity which the public may present.[52]

Other speakers likewise evinced a clear intent to protect against the evils of monopoly. Senator Borah, for example, stated: "I have no doubt of the intent of the framers of this proposed legislation to inhibit or prohibit monopoly. . . ."[53] And Senator Copeland, Chairman of the pertinent committee, pointed to the "competition to the extent necessary" language in the declaration of policy section—§ 2 of the 1938 Act which was reenacted in 1958 as § 102 of the Federal Aviation Act—as one of "five places in the pending bill where the question of monopoly is dealt with in one way or another with the view to its control and prevention."[54]

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[51] 83 *Cong.Rec.* 6507 (1938).

[52] 83 *Cong. Rec.* 6852 (1938). Senator McCarran was the author of the original Senate bill.

[53] 83 *Cong.Rec.* 6730 (1938).

[54] *Id.* Senator Copeland was chairman of the Senate Commerce Committee which conducted the hearings on the bill.

The central point is that this was one of an emerging group of statutes that did not regulate the so-called "natural monopolies" that identified conventional public utility regulation, but instead called for "regulated competition," achieving the benefits of competition without the evils of unrestrained entry or under-cost rate wars.

It is significant that Congress, addressing itself to the air transport industry, deliberately fashioned this 1938 law so as to identify competition in express language as a key element of the public interest. During the Senate debate it was emphasized that both of the 1938 bills—the McCarran bill and the Administration substitute—altered the general declaration of policy contained in earlier bills to take "explicit recognition of the importance of competition to the extent necessary to assure the sound development of air transport."[55]

Numerous early CAB opinions provide insight into the intended role of competition in the new regulatory scheme. In one of its first decisions the Board stated: "Reference to both the legislative history and to the text of the act demonstrates the congressional intent to safeguard an industry of vital importance to the commercial and defense interests of the Nation against the evils of unrestrained competition on the one hand, and the consequences of monopolistic control on the other."[56] The CAB read the inclusion of an express reference to competition in § 2 to render inapplicable doctrine developed under other transportation regulatory schemes that competition should not be authorized where an existing carrier was furnishing adequate service and stood ready to meet any additional

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[55] 83 *Cong.Rec.* 6726 (1938) (comparison of bills submitted by Senator Truman).

[56] *Acquisition of Western Air Express Corp.*, 1 CAA 739, 749-50 (1940) (a § 408 case), *cited with approval in Additional North-South California Services Case*, 4 CAB 373, 374 (1943) (interpreting § 2 in a route award proceeding).

service needs of the public.[57] The Board stated explicitly that when "competition will be neither destructive nor uneconomical . . . the Board is directed to implement competition" because it generally promotes the other public interest factors set forth in § 2.[58] Thus the CAB concluded in the *Additional North-South California Service Case:*

> While no convenient formula of general applicability may be available as a substitute for the Board's discretionary judgment it would seem to be a sound principle that, since competition in itself presents an incentive to improved service and technological development, there would be a strong, although not conclusive, presumption in favor of competition on any route which offered sufficient traffic to support competing services without unreasonable increase of total operating cost.[59]

[57] *See American Export Airlines, Inc.*, 2 CAB 16, 29-31 (1940). Subsequent CAB decisions have firmly established that, in considering the extent to which competition is necessary to the sound development of the air transportation system, the Board "has not been guided by the negative concept of determining first whether the existing services met minimum standards of legal adequacy." *Southwest Northeast Service Case*, 22 CAB 52, 60 (1955). Although inadequacy of existing service is a factor to be weighed heavily in assessing the need for a competitive spur, the presence of adequate service by a monopoly carrier does not supplant the statutory recognition of the desirability of competition. *See, e. g.*, Domestic Passenger-Fare Investigation, Order 71-4-54, April 9, 1971, at 27 ("We have stated that major markets require competition regardless of the quality or quantity of service provided by monopoly carriers."); *Syracuse-New York City Case*, 24 CAB 770, 790 (1957) ("as to the principal criteria for authorizing competing service: the size, importance, and potential are the prevailing factors—not adequacy of service"); *Hawaiian Case*, 7 CAB 83, 103 (1946); *Additional North-South California Services Case*, 4 CAB 373, 375 (1943).

[58] *See, e. g.*, Domestic Passenger-Fare Investigation, Order 71-4-54, April 9, 1971, at 27; *Seaboard & Western Airlines, Inc., Mail Authorization*, 29 CAB 49, 85 (1959); *Southern Service to the West Case, Reopened*, 18 CAB 790, 799-800 (1954); *Trans-Pacific Airlines, Ltd.*, 12 CAB 900, 901 (1951); *IATA Agency Resolutions Proceeding*, 12 CAB 493, 509 (1951); *Colonial Airlines, Inc., et al., Atlantic Seaboard Operation*, 4 CAB 552, 555 (1944).

[59] 4 CAB 373, 375 (1943).

And it further explained in the *Hawaiian Case*:

> The greatest gain from competition . . . is the stimulus to devise and experiment with new operating techniques and new equipment, to develop new means of acquiring and promoting business, including the rendering of better service to the customer and the Nation. . . . Competition invites comparison as to equipment, costs, personnel, methods of operation, solicitation of traffic, all of which tend to assure the development of an air transportation system as contemplated by the Act.[60]

The legislative history and the early CAB decisions indicate that there is no presumption in favor of competition *per se* because competition may prove uneconomical and destructive of the healthy development of the industry if the relevant market is too small to support competing carriers. But when sufficient traffic exists to support competition, certification of competing carriers is mandated by the Act as providing the best means of effectuating the other public interest goals contained in § 102.[61]

[60] 7 CAB 83 103-04 (1946).

[61] The CAB has repeatedly noted the unique advantages to improved service offered by competition. *See, e. g., North Atlantic Route Case*, 6 CAB 319, 326 (1945) ("No effective substitute for healthy competition as a stimulus to progress and efficiency can be found in monopoly."); *Colonial Airlines, Inc., et al., Atlantic Seaboard Operations*, 4 CAB 552, 555 (1944) ("The improvements which flow from competitive service cannot be obtained by administrative fiat. There is no regulation conceivable which could assure courtesy by a carrier's employees, for example, and it would be extremely difficult to attempt to dictate many other matters affecting the quality of service rendered."). In the present proceeding, the Board noted that "competition ultimately holds the greatest potential for vigorous development of air transportation." Order 72-12-29 at 3, JA 86.

We place substantial reliance on this view of the role of competition both because of the particular respect due a "contemporaneous construction of a statute by men charged with the responsibility of setting its machinery in motion" [62] and because the Board "has from the outset consistently taken" that position.[63] Although Continental and the Department of Justice, as *amicus curiae*, charge that this case is indicative of the Board's recent unannounced abandonment of this view and adoption of a route freeze policy,[64] we need not address that claim in view of the Board's failure to articulate its actions as a fundamental change in policy. "In our reviewing role, it is peculiarly appropriate for us to take the Board at its own word as to what it was doing, and to scrutinize the result in terms of that process." [65] We thus proceed to an examination of the Board's treatment of the record to determine whether there is substantial evidence indicating either that the San Diego-Denver market lacks sufficient traffic potential for healthy competition or that another

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[62] *Power Reactor Development Co.* v. *International Union of Electrical Workers*, 367 U.S. 396, 408, 81 S.Ct. 1529, 6 L.Ed.2d 924 (1961), *quoting Norwegian Products Co.* v. *United States*, 288 U.S. 294, 315, 53 S.Ct. 350, 77 L.Ed. 796 (1933); *see NRDC v. Train*, —— U.S.App.D.C. ——, ——, 510 F.2d 692, 706 (1974).

[63] *Trans-Pacific Airlines, Ltd.*, 12 CAB 900, 901 (1951); *see* Southern Tier Competitive Nonstop Investigation, Order 69-7-135, July 24, 1969, *quoted in Continental Air Lines, Inc.* v. *CAB*, 143 U.S.App.D.C. 330, 338, 443 F.2d 745, 753 (1971) ("The Board has always taken the view that competition in markets which can sustain it is the best guarantee of good service to the traveling public."); Domestic Passenger-Fare Investigation, Order 71-4-54, April 9, 1971, at 27 ("One of our principal policies has been that the traveling public is entitled to the benefit of competition whenever it is justified by existing and projected market traffc.).

[64] *See* Reply Brief for Petitioners at 13-16; Brief for United States as *Amicus Curiae* at 31-34.

[65] *Continental Air Lines, Inc., supra note* 63, at 341, 443 F.2d at 756.

public interest consideration outweighs the significant benefits afforded by competition.[66]

III. *Lack of Substantial Evidence to Support Rejection of Competition*

The post-remand orders under review in this case set forth two justifications for rejecting the ALJ's recommendation that competitive nonstop service be certificated for the San Diego-Denver market—maintenance of the economic health of the industry and the fuel shortage. Although a comprehensive analysis would pinpoint a number of shortcomings in the CAB's opinions, we find that a focused examination of the evidence supporting these two core rationales is entirely sufficient to demonstrate the lack of substantial evidence to underpin the Board's rejection of competition.

A. *Promotion of Sound Economic Conditions*

In its initial orders culminating in a remand for further proceedings on the issue of competitive nonstop service, the Board concentrated on the economic threat to Western posed by authorization of a competing carrier. Although the ALJ had found that the market would be large enough to support competition in 1970, the initial forecast year, the Board concluded that the projection was too optimistic "[i]n view of the recent lag in nationwide traffic growth"

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[66] The CAB's counsel at oral argument on appeal stated that the Board recognized "the prime value of competition" and asserted that "the Board's interpretation of the statute would be that competition would be mandated" where two carriers could achieve a profit and a reasonable return and absorb the new route without adverse impact on their system-wide operations. Accordingly, Board counsel stated that "the question would turn on the evidence in the record as to the projections going to traffic growth and the projections going to revenues that would be received if competition were instituted."

and credited Western's "gloomy forecast" of "a sizeable operating loss if competitive nonstop service is instituted."[67] When Continental petitioned for reconsideration on the basis that the record showed substantial growth in the San Diego-Denver market contrary to the national trend, the Board responded that "more recent O & D data demonstrates [sic] that the market is by no means an exception to the nationwide slowdown."[68] The CAB went on to project an $84,000 operating loss for Western in 1971 under competition with Continental and to conclude that "Continental's advantages" were outweighed "by the harm the carrier would cause to Western's operations . . . at a difficult period for the industry as a whole and for Western in particular."[69] When discovery of an error erased the $84,000 loss projection, the Board altered its analysis of the competition issue. It remanded the question for further proceedings, stating that "[t]hese revised figures render extremely close the balance of decisional criteria—harm to Western under existing economic conditions weighed against public benefit factors favoring competition and improved beyond service. . . ."[70]

Significantly, by the time of the last CAB order in May, 1974, the Board had abandoned its reliance on the threat of competition to the profitability of Western's San Diego-Denver service. The ALJ and the CAB's Bureau of Operating Rights again found that there would be substantial growth in the market in both the 1972 and 1973 forecast

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[67] Opinion 70-4-46, April 9, 1970, at 4, JA 41.

[68] Order 71-3-135, March 23, 1971, at 2, JA 68.

[69] *Id.* at 4-5, JA 70-71. The Board relied solely on 1969 growth figures in projecting 1971 traffic. The CAB did not distinguish earlier decisions refusing to base determinations on short-term, recession traffic data. *See New York-San Francisco Nonstop Service Case*, 29 CAB 811, 815 (1959).

[70] Order 71-4-112, April 16, 1971, at 1, JA 79.

years and projected that both Western and Continental would achieve sizeable profits in each of those years.[71] The Board again deemed the ALJ and Bureau of Operating Rights' traffic forecast "too optimistic," making numerous downward revisions in the ALJ's forecasting assumptions and concluding that the competitive service was "likely to produce, at best, only marginal financial results."[72] In contrast to its pre-remand orders, the Board did not make the key bottom line profit and loss calculation in its 1972 order or include any reference to the financial status of Western and Continental. Implicit in the Board's decision was its belief that any doubts as to the profitability of competition should be resolved against certification of a second carrier "to avoid impeding the industry's opportunities for full recovery."[73]

The CAB argues that its analysis of traffic projections and balancing of public interest factors involve a "specialized task" that is "within the Board's special province" and that the court should defer to the agency's

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[71] *See* text accompanying notes 24-25 *supra*.

[72] Opinion 72-12-29, December 8, 1972, at 3, 8-12, JA 86, 91-95. The Bureau's forecast had used a 7.5% annual growth rate, a 15% stimulation figure, and estimated that 30% of the San Diego-Twin cities traffic would travel on Western via Denver. Using 1968-71 figures, and discounting for presumed stimulation from Western's commencement of nonstop flights, the Board selected a 3% growth rate for 1972 and 1973. Yet, at the time the Board adopted its 3% figure based on recession experience, it had Western's projection of a 10% growth rate and Western's traffic data through April, 1972, showing a 12% increase for the first four months of 1972 over the first four months of 1971. *See* Brief for Petitioner at 39-40. The Board also failed to note or to explain adequately the result that its 1973 forecast of 98,409 (the ALJ's forecast of 127,409 minus the reduction of 29,000 passengers resulting from the Board's adjustments; JA 93) was substantially lower than its corrected projection of 106,851 passengers for 1971.

[73] Opinion 72-12-29, at 2, JA 85.

expertise in these technical matters.[74] In response, Continental identifies a number of danger signals that serve to alert the court to the Board's failure to engage in a reasoned application of its expertise—a predicate to restrained and deferential judicial review of an agency's actions.[75] It points to the ever-shifting basis of the Board's decisions, the inexplicable delay in preparation of agency orders, and the persistent conservative downgrading of the ALJ's and staff's traffic forecasts in the teeth of data revealing significant growth as danger signals indicating that the Board's adjustments and conclusions are a product of "result-oriented" rationalization.[76]

We are not required to rule on this contention, to evaluate the strength of these danger signals or to consider whether they undercut the deference normally accorded to agency analyses of technical traffic matters. These matters have been obviated by the Board's May, 1974 Opinion and Order on Reconsideration, which concedes the need for adjustment of its forecast and states that competition would be profitable.[77] Subsequent additions to the traffic data that were before the Board prior to its 1972 order convincingly demonstrated that the majority members severely underestimated the size of the market.[78] Faced with these figures, the Board acknowledged what could not fairly be denied—"the prospects for profitable competitive

[74] Brief for Respondent at 22, 38-39.

[75] *See Greater Boston Television Corp.* v. *FCC*, 143 U.S.App.D.C. 383, 393, 444 F.2d 841, 851 (1970), *cert. denied*, 403 U.S. 923, 91 S.Ct. 2229, 29 L.Ed.2d 701 (1971).

[76] *See* Brief for Petitioner at 16-18, 47-49.

[77] *See* Order 74-5-17, May 3, 1974, at 3, 10, 13, JA 102, 109, 112.

[78] Continental's petition for reconsideration pointed to Western's traffic data showing a 23.9% growth in the market during the first eleven months of 1972 over the same period in 1971. *See* Petition of Continental Air Lines, Inc. for Reconsideration of Order 72-12-29, January 29, 1973, Appendix 10, at 1, JA 329.

operations are far stronger than earlier believed" and "competitive service would be more profitable than originally anticipated."[79]

But then the Board brushed these developments aside, stating that its "original decision did not turn on profitability alone. . . ."[80] Since the profitability of Western was the crucial reason for the original remand, we do not see how this fairly could be discarded without explication of why the change in this factor did not alter the conclusion.[81] The only factor identified in the Board's April, 1971 order authorizing the remand of the competition question was profitability—"harm to Western under existing economic conditions. . . ."[82] The March, 1971 Supplemental Opinion and Order on Reconsideration had pointed to the related factor of "a difficult period . . . for Western in particular," but by May, 1974, Western's financial situation had brightened with earnings in excess of the 12% level found "reasonable" by the Board in its Domestic Passenger-Fare Investigation.[83]

The only remaining factor mentioned in the CAB's prior decision in this matter was the financial condition of the industry as a whole. But that consideration had been relied upon solely in terms of justifying a "more than usually careful" approach to evaluating the competition question in the San Diego-Denver market. That approach may have validity, if not carried to extremes, for it still leads

[79] Order 74-5-17, May 3, 1974, at 3, 13, JA 102, 112.

[80] *Id.* at 3, JA 102.

[81] *See Greater Boston Television Corp.* v. *FCC*, *supra* note 5, at 394, 44 F.2d at 852.

[82] Order 71-4-112, April 16, 1971, at 1, JA 79.

[83] *See* Domestic Passenger-Fare Investigation, Order 71-4-58, April 9, 1971, at 2. Western's 1973 rate of return was 12.3% and its profit for the fiscal year ending March 31, 1974 was 14.1%. *See* Brief for Petitioner at 15.

up to an ultimate decision focused on the subject market. But we are unable to discern on what basis the Board can glean any support from this factor of general conditions once it has recognized, as it now apparently has, that the particular market will sustain competition and still be profitable. If an air transport market is substantial and thriving, we do not see how the fact that other markets are over-served, can justify leaving this market under-served, or depriving it of the public-interest benefits of competition.

Is the Board obliquely saying that monopoly profits are needed in this market to sustain overall industry earnings when shaky?

This would not only raise serious questions of Congressional intent, and adequacy of articulation of reasoning, but present the question whether there is evidence to show that competition in this market will not maintain overall profits,[84] by enhancing efficiency, quality of service, and the size of this and connecting-beyond markets.[85] In the end we are left with the conviction that the Board's reference to general industry conditions is "local color"

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[84] Under previous Board opinions, the important issue is not maintenance of existing profit levels but the more fundamental concern that carriers derive some profit from the market. *See* Southern Tier Competitive Nonstop Investigation, Order 73-2-89, February 23, 1973, at 7-8 (The Board noted that, once applicants "can be expected with reasonable assurance to operate their proposals at a profit," "[t]he relative profitability of their various operations is therefore not nearly as important a decisional factor as the public benefits they can provide."). In the present case, the ALJ noted that the Board "traditionally does not look beyond the estimated operating profit or loss on a proposed operation" to consider rate of return. Supplemental Initial Decision, *supra* note 24, at 80 n. 140, JA 610 n. 140.

[85] The Board in 1971 had viewed the prospect of new profitable operation by Continental in the instant and connecting beyond segments as a "significant" positive factor. *See* Order 71-3-135, March 23, 1971, at 4, JA 70.

to gain an atmosphere of acceptability for the result, rather than a novel, independent ground of decision resting on substantial evidence.

We have not ignored the passage, in the Board's opinion denying reconsideration, which says that the industry's faltering in its effort to achieve recovery "fortifies our resolve to avoid making unnecessary awards of competitive authority on routes that are adequately served."[86] The structure of this sentence suggests that the general faltering of industry factor (which we have already discussed and found wanting) was taken in conjunction with, and as fortifying, a separate regulatory notion that competition is "unnecessary" when existing (monopoly) service is "adequate." Such a concept would not only constitute a fundamental change in doctrine that requires a more direct address and reasoned analysis than this elliptical reference[87] but more important would conciet with the intent of Congress as we discern it.[88]

B. *The Fuel Shortage*

We come, finally, to the fuel shortage issue to which the Board referred in ultimately denying reconsideration. The onset of the oil embargo in late 1973 diminished the fuel supplies available for air transportation. The Board's May, 1974 opinion grasped the fuel problem as an independent reason for rejecting competitive service.[89] As the

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[86] Order 74-5-17, May 3, 1974, at 2, JA 101.

[87] *See Greater Boston Television Corp. v. FCC*, *supra* note 75, at 394, 44 F.2d at 852; *Northeast Airlines, Inc.* v. *CAB*, 331 F.2d 579, 589 (1st Cir. 1964) (Aldrich, J., concurring).

[88] We approve the initial construction of the Act adopted by the Board concerning the relevance of the monopolist's service to the need for competition. *See* text accompanying note 57 and note 57 *supra*.

[89] *See* Order 74-5-17, May 3, 1974, at 1-2, 13, JA 100-01, 112; Brief for Respondent in No. 74-1664, *Eastern Air Lines, Inc.* v. *CAB*, at 24.

Justice Department brief remarks, since fuel shortages are a permanent fixture of American life, this is tantamount to writing § 102(d) out of the Act.[90] Moreover, the Justice Department aptly comments that there is no support for the Board's alleged fear that certificating competitive service would increase fuel consumption at the expense of more "essential service elsewhere" to the "overall" detriment of the public interest."[91] The crisis of late 1973 may have justified temporary orders to preserve the status quo pending analysis, but not an indefinite abdication by CAB.[92] We have recently noted in another context that the existence of an energy crisis does not excuse a regulatory agency's "failure to seek answers" pertinent to the exercise of its duties or its "abdication of its duty to 'indicate fully and carefully the methods by which, and the purposes for which, it has chosen to act.'"[93]

The CAB contends that its reference to the Remanded Atlanta/Detroit/Cleveland/Cincinnati Investigation was sufficient since "there was no reason for the Board to repeat in this case what it had already said in a companion case issued on the same day."[94] However, in the companion case the Board found that the proposed competitive flights "would consume well over 10 million gallons of fuel annually." In addition, it noted that the markets under consideration there were experiencing load factors "only moderately if at all above the Board's rate-making

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[90] Brief for United States as *Amicus Curiae* at 31 n. 16.

[91] *Id.* at 30; Dissent of Member Minetti on Order 74-5-17, May 3, 1974, at 4-5, JA 123-24.

[92] *See United States v. CAB*, —— U.S.App.D.C. ——, ——, 511 F.2d 1315, 1325-27.

[93] *See Public Service Comm'n v. FPC*, —— U.S.App.D.C. ——, ——, 511 F.2d 338, 346 (1975).

[94] Brief for Respondent at 36.

standard of 55 percent."[95] Here, by contrast, additional fuel was not required to institute competition. At the time of the final order, Western was planning to run four and a half nonstop trips in the San Diego-Denver market. This exceeded the two round trip flights each which the carriers had proposed to institute in the remand proceedings.[96] Moreover, the monthly on board coach load factors on Western's San Diego-Denver flights were repeatedly well in excess of the 55% level during the 14 months ending with July, 1973.[97] In this context, the Board's bare reference to the fuel shortage rationale set forth in the Atlanta-Detroit case is not sufficient to constitute reasoned decision-making for the disparate conditions of the San Diego-Denver market.

Section 102 sets forth six public interest factors to guide the CAB in the exercise of its statutory duties. We are cognizant that in reviewing agency orders "[t]he court's responsibility is not to supplant the [Board's] balance of of these interests with one more nearly to its liking,"[98] but the state of the record establishes that the Board recited the public benefits to be derived from competition, and did not itself accord them any real weight in the balance, dismissing them, in effect, as overborne by considerations, of the health of the industry and the fuel sit-

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[95] Opinion 74-5-18, May 3, 1974, at 4 & n. 6, JA 129 & n. 6.

[96] *See* Supplemental Initial Decision, *supra* note 24, at 28, 43 n. 9, JA 558, 573 n. 91.

[97] *See* Order 74-5-17, May 3, 1974, at Appendix A, JA 115 (6 months with load factors in excess of 60% and 3 additional months with load factors in excess of 70%).

We express no opinion on the merits of the petition to review the companion case relied on by the CAB in the instant proceeding. That case pending in this court, *Eastern Air Lines, Inc. v. CAB, No. 74-1664* (D.C.Cir., filed June 28, 1974).

[98] *See Permian Basin Area Rate Cases*, 390 U.S. 747, 792, 88 S.Ct. 1344, 20 L.Ed.2d 312 (1968).

uation, which lacked any support in substantial evidence. Accordingly, the challenged orders are set aside and the record is remanded for further proceedings.

IV. *Remand Proceedings*

The agency proceedings eventuating in Continental's petition for review were commenced over 8½ years ago. Two complete evidentiary hearings have been conducted and the ALJ has issued two thorough initial decisions detailing the characteristics of the market, analyzing traffic forecasts, and compairing the strengths of carriers seeking certification. The record before us contains ample evidence of the need for competing nonstop service. We agree with Intervenor Western Air Lines that "[p]ublic policy dictates that the case be brought to an end."[99] We thus contemplate that the CAB will proceed expeditiously on remand with selection of a competing nonstop carrier. To avoid any unnecessary delay, we note that if the Board should invoke the procedure of petitioning this court to modify its mandate to permit taking of additional evidence on the pendency of this appeal, it should set forth with particularity the matters involved and their relationship to the desirability and feasibility of implementing competition.

Turning finally to the question of carrier selection, we note that this issue has also been fully fleshed out in the previous hearings. The ALJ has twice selected Continental over the other carriers seeking nonstop authorization to compete with Western. The Board has repeatedly noted the substantial beyond market benefits offered by Continental and has spoken in terms of the advantages provided by Continental in addressing the related competition question. Nonetheless, as Intervenor United Air Lines, points out, the Board has not squarely examined the ALJ's findings on the carrier selection issue. On remand the CAB

[99] Brief for Intervenor Western Air Lines at 25.

should review the record and render a supplemental order either adopting the ALJ's determination or setting forth its separate reasons for accepting or rejecting the ALJ's selection. In view of the comprehensive record before the agency and the public interest in a prompt determination, we trust that the Board will proceed with expedition in completing carrier selection.

The case is remanded for further proceedings in accordance with this opinion.

So ordered.

APPENDIX B

Federal Aviation Act of 1958
[49 U.S.C. § 1302, § 1371, § 1486, and 5 U.S.C. § 706]

DECLARATION OF POLICY: THE BOARD

Sec. 102 [49 U.S.C. Code 1302]. In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation, by air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The promotion of safety in air commerce; and

(f) The promotion, encouragement, and development of civil aeronautics.

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

CERTIFICATE REQUIRED

Sec. 401 [49 U.S. Code 1371]. (a) No air carrier shall engage in any transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.

ISSUANCE OF CERTIFICATE

(d) (1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the application is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

AUTHORITY TO MODIFY, SUSPEND, OR REVOKE

(g) The Board upon petition or complaint or upon its own initiative, after notice and hearings, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: Provided, That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition or limitation found by the Board to have been violated. Any interested

person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of the certificate.

JUDICIAL REVIEW OF ORDERS

Orders of Board and Administrator Subject to Review

Sec. 1006 [49 U.S. Code 1486]. (a) Any order, affirmative or negative, issued by the Board or Administrator under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States of the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of the court upon a showing of reasonable grounds for failure to file the petition theretofore.

Venue

(b) A petition under this section shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

Notice to Board or Administrator; Filing of Transcript

(c) A copy of the petition shall, upon filing, be forthwith transmitted to the Board or Administrator by the clerk of the court, and the Board or Administrator shall thereupon file in the court the record, if any, upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. [Subsection (c) as amended by Public Law 86-546, 86th Congress, 2d Session, approved June 29, 1960, 74 Stat. 255.]

Power of Court

(d) Upon transmittal of the petition to the Board or Administrator, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board or Administrator. Upon good cause shown and after reasonable notice to the Board or Administrator, interlocutory relief may be granted by stay of the order by such mandatoy or other relief as may be appropiate. [subsection (d) as amended by Public Law 87-225, 87th Congress, 1st Session, approved September 13, 1961, 75 Stat. 497.]

Findings of Fact Conclusive

(e) The findings of facts by the Board or Administrator, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Administrator shall be considered by the court unless such objection shall have been urged before the Board or Administrator or, if it was not so urged, unless there were reasonable grounds for failure to do so.

Certification or Certiorari

(f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board or Administrator shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in section 1254 of title 28, United States Code.

Scope of Review

[5 U.S. Code 706]. To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or appli-

cability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.

Supreme Court, U. S.
FILED
NOV 13 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-711

WESTERN AIRLINES, INC., *Petitioner*

v.

CONTINENTAL AIR LINES, INC., *Respondent*

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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NOTE: References in petitioner's brief to these orders and opinions are made to the joint appendix (J.A.) submitted by the parties in the Court below. Therefore, joint appendix page numbers are noted in brackets at the left margin in the line where such material begins.

75-5-17

[J.A. 100] UNITED STATES OF AMERICA CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

Adopted by the Civil Aeronautics Board at its office in Washington, D.C. on the 3rd day of May, 1974.

Docket 18104

ADDITIONAL SERVICE TO SAN DIEGO CASE
(San Diego-Denver)

Opinion and Order On Reconsideration

BY THE BOARD:

By Order 72-12-29, December 8, 1972, the Board issued its decision in the remanded phase of this case, in which it denied all applications for additional nonstop San Diego-Denver authority. Petitions for reconsideration of Order 72-12-29 were filed by Continental Air Lines, Inc.; the City and County of Denver and the Public Utilities Commission of Colorado; Kansas City and the Chamber of Commerce of Greater Kansas City;[1] and the San Diego Unified Port District, the City of San Diego, and the San Diego Chamber of Commerce. Western Air Lines filed an answer opposing the petitions for reconsideration and Airwest, Trans World Airlines, and United Air Lines filed similar answers opposing reconsideration and generally supporting the Board's decision.

Upon consideration of the matters presented, we have decided to deny the petitions for reconsideration of the Board's original decision. We do so essentially for the reasons set forth in that decision and, in addition, because of the current fuel shortage which has become a significant

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[1] The Board inadvertently omitted refernce to the Kansas City Parties in its list of those persons filing briefs and participating in oral argument. However, the Board did consider their arguments presented in their brief and appearance before the Board.

problem since the original decision was issued. In our December 1972 opinion, the Board emphasized that it must be more than usually cautious—when the industry is plagued by retrenchments and lagging traffic growth—about granting new competitive route awards. Applying this principle to the case before it, the Board found the incumbent's San Diego-Denver service fully met the market's needs. In those circumstances, the Board declined to authorize additional competition, particularly since profits for new service could not be predicted with confidence.

The industry continues to falter in its attempts to make the financial recovery which our policy of caution was designed to assist. This fortifies our resolve to avoid making unnecessary awards of competitive authority on routes which are adequately served. Similarly, because of the current fuel shortage, the Board must guard against licensing one carrier to duplicate another carrier's services to the detriment of essential services elsewhere.

In reaching our conclusions on reconsideration, we have also fully evaluated (a) the allegations of error regarding the Board's original economic findings and (b) the most current data available. This evaluation convinces us that there is no fundamental defect in the Board's original determination which requires reconsideration as a matter of law [2] [J.A. 101] or that a change in the Board's original result is otherwise warranted by the public interest. Specifically, we find nothing in the petitions to support the claim that one of the Board's original findings—*i.e.*, that a competitive award would lead, at best, to economically marginal operating results—was either unsupported by the record or constituted an improper exercise of the Board's discretion. We appreciate, of course, that the data which have become available since the Board's original decision was reached now tend to indicate that the prospects for profitable competitive

[2] Delta Air Lines v. CAB, No. 72-1377 (D.C. Cir., filed Oct. 23, 1973).

operations are far stronger than earlier believed, and we have carefully considered this change in reaching our decision on reconsideration. However, the Board's original decision did not turn on profitability alone, and we believe, in sum, that the public interest would not be best served by a change in the Board's original result.[3] Our views with respect to the fuel shortage and our comments on various matters raised in the petitions for reconsideration, are discussed below.

[J.A. 103] *Recent Precedent and Policy*

Petitioners argue that the Board's action in this proceeding is wholly at odds with decisions over the recent past, particularly with respect to the awards of competitive authority. We reject this argument. We acknowledge that the Board has not often set down a route case for hearing and then decided at the end of the proceeding on the basis of the record that it was not in the public interest to certificate new service. However, this proceeding is unusual in that it involved—at the outset—the basic question of first nonstop service. Such service was, in fact, authorized and the Board has declined only to make a competitive award in the same proceeding. Thus, the case is substantially similar to the *Phoenix-Portland/Seattle Nonstop Case*, Order 70-8-13, August 5, 1970. More importantly, we see nothing in other cases in which the Board has certificated new competition that requires us to do so in this case. On the contrary, the Board remains free, subject to a full explanation of its findings and considerations, to reach a conclusion on the merits of this case which may vary from the results reached in other circumstances, in other markets, or in prior times. The facts of this case persuade us not to authorize new competition. Our decision is supported by the record and is in accord with the policy guidelines established by the Federal Aviation Act.

[3] See ICC v. City of Jersey City, 322 U.S. 503 (1944).

The route awards chiefly relied on by Continental in urging reconsideration were made before or during 1970. However, the economic climate in which these cases were set down and decided was different from that which has been evolving since. Indeed, in the original opinion in this very case, issued in April 1970, the Board sounded one of its [J.A. 104] earliest notes of caution with respect to declining traffic growth, the profit picture within the industry, and the hazards of overcapacity. After recognizing that competitive nonstop service had been authorized in the past in markets no larger than San Diego-Denver the Board nonetheless concluded:

> . . . [I]t appears that Western's proposed service will be entirely adequate to meet the service needs of the markets at issue. Under all the circumstances, therefore, we find it more consistent with the goal of fostering sound economic conditions in air transportation—even at the cost of foregoing some undoubted beyond benefits a second carrier could provided—to certificate only Western at this time. . . .

Order 70-4-46, April 9, 1970, p.4. See also, by way of example, *Application of Ozark Air Lines*, Order 71-1-78, January 15, 1971, declining to set the local service carrier's application for hearing notwithstanding substantial first single-plane benefits (including the avoidance of the congested airport facilities at Chicago); and the *Des Moines-Twin Cities-St. Louis Subpart M Proceeding*, Order 70-4-150, April 29, 1970, establishing new and stricter criteria for the lifting of certificate restrictions on local service carrier [J.A. 105] operating authority in competitive markets.[4] Most

[4] See also, Domestic Passenger Fare Investigation (Phase 6B—Load Factors), Order 71-4-54, April 9, 1971, where the Board adopted load factor standards as a new approach to discouraging capacity increases in excess of traffic needs; Piedmont Aviation Deletion of Elizabeth City, Order 72-4-96, April 18, 1972, and similar cases, where the Board enunciated principles concerning

recently, in declining to adopt its tentative decision authorizing competitive service in the *Mohawk Segments 8 and 9 Renewal Proceeding*, Order 73-9-100, September 27, 1973, the Board stated:

> The air transportation system is slowly emerging from a period of lagging traffic growth and overcapacity and the Board is now engaged in a long range program looking toward a rationalization of the existing system and an improvement in the economic health of the industry. The earnings prospects of the carriers, however, still remain uncertain. In such an atmosphere the Board must be more than usually careful in appraising all of the various costs and benefits that a route award might have on air transportation system and on the public, which, in the end, can only be served by the maintenance of a healthy industry. . . .

This approach has been warranted in light of recent experience. As this experience has taught, an unduly optimistic anticipation regarding traffic response on the part of carrier-applicants or the Board can have unfortunate economic effects, even for financially healthy carriers. A failure of traffic to materialize as forecast, after all, can result in both serious inconvenience to passengers who come to anticipate or rely on newly authorized services, as well as increased costs to the carrier and, ultimately, the Federal Treasury or the traveling public in general.[5]

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the elimination of unnecessary services at smaller communities; and the Flying Tiger Line Inc. Additional Points Case, Order 71-11-33, November 8, 1971, where the Board declined to award all-cargo authority at new points.

[5] In the Service to Omaha and Des Moines Case, Order 70-7-24, July 6, 1970, to cite a single example, it was concluded that the Omaha-Chicago market would generate almost 1,000 daily passengers in 1970, and that such traffic could support nonstop competitive operations. The forecast utilized the historic (1964-1968) growth rate and also applied the 20 percent figure ordinarily used

[J.A.] 106 To be sure, certain competitive awards have been made during the transitional period. In such cases, however, the records have ordinarily revealed some unique service or operational consideration, such as substantial deficiencies in historic or existing service, *Southern Airways Route Realignment Proceeding*, Order 73-2-90, Feb. 23, 1973, or markets located in a fashion which would permit the carrier to combine service to several points so as to provide an economically sound operation, *Twin Cities/Milwaukee Southeast Points Investigation*, Order 70-11-6, Nov. 3, 1970, and *Additional Service to Columbia and Augusta Case*, Order 71-7-118, July 21, 1971. Such circumstances are not present here. Moreover, the Board's earlier awards were made at a time when the fuel emergency had not yet become a major concern.

Specific comparisons have been made between the instant case and the Board's decision in the *Southern Tier Competitive Nonstop Investigation (Houston-Miami Phase)*, Docket 18257. While the two proceedings have certain similarities which, in fact, led four members of the Board to conclude that similar results would be justified,[6] the differ-

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to measure the stimulative effect of first competitive service. In fact, however, local O&D and connecting traffic reached only about 500 daily passengers by 1971 with the result that Frontier—the carrier selected to provide the competitive service—was required to suspend its Chicago-Omaha operations. See Order 71-1-100, January 28, 1972. While other factors may also have contributed to the need for suspension, the failure to fully anticipate traffic developments was clearly an important element. In a related case, the Board authorized Frontier to provide nonstop competitive service in the Chicago-Lincoln market (Order 71-4-75) largely to correct the lag in service benefits (including the lack of commuter schedules) which characterized the incumbent's operations. Such nonstop competitive service, however, was never instituted.

[6] Chairman Timm and Vice Chairman Gillilland would have denied competitive authorizations in both cases, Member Minetti and former Member Murphy would have made competitive awards in both cases.

ences between the two cases are also sufficiently material so that an award of competitive authority in *Houston-Miami* does not mandate an identical result here. To begin with, the Houston-Miami market was about 20 percent larger in 1972 notwithstanding both markets received the same volume of nonstop service for much of the year.[7] The Houston-[J.A. 107] Miami market was also forecast to be larger with new competition in 1973 (almost 420 daily passengers vs. about 275 daily passengers), and Continental possesses a more substantial backup system to support its operation. Furthermore, Western's existing services between San Diego and Denver (as well as its historic responsiveness to the needs of the market) were found to be sufficient although competition was found required in the Houston-Miami market to correct serious deficiencies in the services offered by the incumbent carrier.[8] And, finally, the Houston-Miami award involved the question of continuing service earlier found to have been required by the public convenience and necessity and not judicially challenged.[9] As such it stands in a somewhat different posture from the authorization of wholly new competitive service.[10]

In the Board's original decision in this proceeding, it was concluded, on the basis of the record then before the Board, that the prospects for successful competitive operations

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[7] Houston-Miami received three daily round trips. San Diego-Denver received two daily round trips until June, when a third round trip was added.

[8] The smaller San Diego-Denver market will receive 50 percent more nonstop service (3 round trips vs. 2) than the Houston-Miami market would have received in the absence of competition.

[9] The court proceeding which resulted in the remand of the Houston-Miami award concerned only the question of carrier selection. See Orders 71-3-34, March 5, 1971 and 71-11-17, Nov. 3, 1971.

[10] Cf: Application of American Airlines and Frontier Airlines, Order 73-6-106, June 27, 1973.

were limited, at best, and that certification of a second nonstop carrier under all the circumstances would be imprudent. While the more recent information now suggests that the prospect for profitable competitive operations is improved, we continue to believe that, on balance, a competitive authorization is unnecessary and undesirable at this time. This conclusion is fully consistent with current Board precedent and policy.

[J.A. 108] *Decisional Considerations.*

Continental argues that the Board (a) did not consider the administrative law judge's evaluation of the record and (b) gave improper weight to certain decisional considerations—*e.g.*, the use of recent growth rates as opposed to growth rates premised on longer, prior periods, and the recognition of service improvements made during the course of the proceeding. We disagree with these arguments. The administrative law judge's material findings were fully evaluated in the course of the Board's decision. The fact that the Board's opinion does not discuss each of his determinations in terms, or find them persuasive, does not suggest that they were not considered. Indeed, as we read the petitions for reconsideration, their primary disagreement is with the Board's evaluation of the administrative law judge's findings and the evidence of record rather than with any failure to consider such findings and evidence.[11]

Continental challenges our reliance on Western's nonstop operations as violative of a policy against according weight to an incumbent's schedule improvements made during the course of a competitive service investigation. It is unnecessary to address ourselves in this case to the present dimen-

[11] There are frequent references in the petitions to the Board's "errors" as to traffic growth, participation, expenses, etc. Such "errors", in fact, largely represent disagreements which the petitioners have with the inferences and determinations which the Board has drawn from the evidence of record.

sions of such a policy. For, as was noted in the original opinion, the circumstances of this proceeding are unusual in that a primary purpose of the remand was to consider the need for [J.A. 109] an additional award in light of Western's actual experience with new nonstop operations. Moreover, as that earlier opinion made clear, the consideration of Western's actual nonstop service (including the addition of the third nonstop round trip) was a means of reviewing the continuing needs of the market in light of the implementation of Western's original service proposal. See Order 72-12-29, at 5, 8. In our judgment, this it quite different from the usual case involving the defensive upgrading of schedules by an incumbent already serving the market.

Further, the somewhat less optimistic forecasting approach (including a greater focus on existing or near future forecasting assumptions) has been characteristic of recent route determinations. This has been true even in those situations where the Board has made a competitive authorization. See, *e.g., Additional Service to Columbia and Augusta Case, supra.* As noted above, we believe this general approach has been warranted by recent experience—notwithstanding the particular traffic increase which occurred in the San Diego-Denver market in 1972.[12]

Finally, we reiterate the majority's earlier view that the demands of beyond traffic do not justify the award of competitive service in the local San Diego-Denver market.

Forecast for Competitive Operations.

Continental objects to the Board's failure to set out a full financial forecast for competitive operations since the case, in the carrier's view, turns on the issue of profitability. Furthermore, Continental argues that the Board's financial projections were deficient. To begin with, the Board's decision does not "turn on profitability" as suggested by Con-

[12] We note, by way of comparison, than the San Diego-Kansas City market showed virtually no traffic growth in calendar 1972.

tinental since profitability is not the sole, controlling criterion for authorizing competition. Further, the Board is not [J.A. 110] required in every case to make a dollar-for-dollar analysis with regard to each component of an applicant's service proposal. While the Board recognizes its obligation to evaluate the economics of proposed route awards on the basis of the evidence of record, and to bring its judgment to bear on such evaluation, the Board has seldom found it necessary to publish, in terms, a forecast for each carrier.[13] Rather, the Board ordinarily reviews all the estimates of record and adopts, as it finds appropriate, the forecast of the administrative law judge, or the Bureau of Operating Rights or one of the other litigants, spelling out in the text of the opinion such changes, concerns, or disagreements as the Board may find necessary. Forecasting, after all, is largely a matter of attempting to predict an overall future result (rather than determining whether any particular component in a forecast is correct or incorrect) and cannot be an exact science. Nonetheless, the Board explains its forecasting decisions in sufficient detail to enable interested persons to understand the results.

Such procedure was followed in this case. In fact, despite Continental's complaint about the Board's forecasts, the carrier was able to construct complete forecasts (for itself and Western) based on the textual comments in the Board's opinion. As indicated in that opinion (p. 10), the Board utilized the Bureau's forecasts which were adopted as reasonable by Judge Goldberg (I.D. 66, 80) but made adjustments with regard to certain of his forecasting assump-

[13] Continental asserts that the Board's "usual practice" is to set forth a profit and loss statement when a decision turns on the question of profitability. However, one of the two cases cited as an example of this "usual practice" (Order 70-8-1, Appendix A) involved only Board adjustments to forecast *traffic*—but not the related revenues, or expenses—and is thus virtually identical (apart from form) to the approach taken in the Board's original opinion in the instant case.

[J.A. 111] tions with which it disagreed. Such adjustments are plainly spelled out at pages 8-12 of the original opinion, and were sufficient to demonstrate that the prospects for successful competitive operations were limited, at best, and that certification of a second nonstop carrier under all the circumstances would be imprudent. Under such circumstances, it was not found necessary to further quantify all potential adjustments.[14]

Continental acknowledges that under the Board's projections there would be losses for both Western and Continental if competitive service were authorized. However, Continental challenges the Board's original finding that a competitive award would lead—at best—to economically marginal operating results; Continental claims, specifically, that the Board improperly excluded various adjustments to the forecasts adopted by the administrative law judge and utilized by the Board which, if made, would result in an increase in revenues and a reduction in expenses sufficient to produce large operating profits for both Continental and Western. The exclusion of these items at the time of the Board's original decision was based upon the evidence of record and nothing in the petitions for reconsideration establishes that their exclusion at that time was unreasonable. Nonetheless, in view of Continental's assertion that these matters were wholly disregarded by the Board (and the carrier's appendices in support of its assertion), it appears desirable—although not necessary—that each be addressed in terms. These matters are set forth as Appendix B to this opinion.

[J.A. 112] Finally, we recognize that more recent data not available at the time of the Board's original decision suggest that a few of the requested adjustments might now be appropriate and that competitive service would be more profitable

[14] See, for example, Order 72-12-29, note 12. This is the same general approach adopted by Judge Goldberg—albeit with a different ultimate results (I.D. 70).

than originally anticipated—although not as profitable as Continental claims. However, nothing in the petitions, or in the recent data, causes us to change our judgment that a competitive award to Continental is unwarranted at this time.

The Current Fuel Shortage

As we have stated in our comparison opinion in the *Remanded Atlanta-Detroit/Cleveland/Cincinnati Investigation*, Docket 20724, the nation in general, and the airlines in particular, are now confronted with a crucial problem of diminished fuel supplies. Thus, in the short term, at least, decisions affecting the level of service in one market will, more than ever before, directly affect service elsewhere in the country. This consideration requires that the Board appraise each individual route authorization with a view to insuring the maintenance of essential existing services and providing the public with the best nationwide air service possible given the limited levels of service necessitated by the fuel shortage. Concomitantly, it mandates a greater emphasis on the need to foster econ my of operation in the airline industry.

[J.A. 113] We have considered the petitions for reconsideration in this context and we believe that denial is more consistent with the nation's fuel conservation efforts. The San Diego-Denver market already receives a level of nonstop service which is reasonably related to traffic demand.[16] There-

[16] In this connection, we have reviewed the service needs of the market in light of more current officially noticeable data and the data submitted by Western since the issuance of the Board's original decision. While the most recent traffic figures show a substantial increase in San Diego-Denver traffic during 1972, Western's load factor data indicate that reserved seat coach load factors have averaged between the low 40s during the Fall season and the low 60s during the peak Summer season. These data confirm the Board's earlier judgment that the addition of a third nonstop round trip in June 1972 would accommodate traffic increases and that there would be ample nonstop capacity for existing traffic demand. Western's load factors reflecting implementation of its third round trip are set out as Appendix A.

fore, a grant of competitive authority to Continental would mainly permit unneeded San Diego-Denver service. Such service is also likely to be provided at the expense of service in other markets—to the overall detriment of the public interest. Similarly, we have considered the additional benefit which Continental could offer in its beyond markets, particularly San Diego-Kansas City. Recent data show virtually no growth in traffic in the San Diego-Kansas City market between 1971 and 1972 and we see no reason to alter the Board's original judgment that the benefit to beyond passengers does not outweigh the factors which otherwise militate against an award of competitive authority to Continental in the San Diego-Denver market.

ACCORDINGLY, IT IS ORDERED THAT:

1. The petitions for reconsideration of Order 72-12-29 be and they hereby are denied;

[J.A. 114] 2. The motions of Continental and Western for leave to file pleadings in excess of the page limitations set out in the Rules of Practice be and they hereby are granted;

3. The motion of Continental requesting the Board to receive certain data, dated September 14, 1973, be and it hereby is granted; and

4. The motions of Continental requesting the Board to direct Western to supply load-factor and traffic data, dated December 12, 1972 and February 27, 1973, be and they hereby are dismissed as moot.

TIMM, Chairman, and GILLILLAND, Vice Chairman, concurred in the above opinion and order. MINETTI, Member, filed the attached dissent. WEST and O'MELIA, Members, did not participate.

EDWIN Z. HOLLAND
Secretary

(SEAL)

[J.A. 115] APPENDIX A

WESTERN'S COACH LOAD FACTORS

Month	Reserved Seat LF	On Board LF
July '73	62.4%	70.1%
June	61.3	69.1
May	43.2	51.4
April	53.1	62.0
March	58.1	65.6
February	53.8	62.5
January	51.6	57.8
December '72	59.8	65.9
November	46.6	55.1
October	41.7	50.6
September	44.6	54.6
August	63.4	74.8
July	58.9	67.5
June	60.7	71.3

[J.A. 116] APPENDIX B

FORECAST FOR COMPETITIVE OPERATIONS

The Forecast for Western.

1. The major alterations requested by Continental in its petition for reconsideration—*i.e.*, revenue increases related to San Diego-Denver and San Diego-beyond traffic—were fully evaluated but not adopted in the Board's original opinion. Such alterations constitute about half of the $2.7 million in potential revenue which Continental claims was improperly excluded from the Board's estimate of Western's operating results. The basis of Continental's claim was a proffer of more recent on-line data submitted by Western. However, the Board's general practice is to rely on changes in the more standardized O&D figures. In this case, there was no substantial showing that Western's on-line data represented a more trustworthy indicator of changes in local San Diego-Denver traffic patterns so as to warrant reliance on the on-line data in lieu of the data utilized in the Board's projections.[1] Consequently, in light of the limited traffic growth during the 3-4 years prior to the time of decision, the Board did not agree with the petitioners that the increase in Western's on-line traffic constituted ample proof that the market's pre-1968 growth had resumed or that it was certain to be resumed at the 15-20 percent level.

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[1] For example, Western's data revealed that the carrier's San Diego-Denver on-line traffic increased about 17 percent between 1969 and 1970 (from 60,688 passengers to 70,947 passengers) although the Board's survey of O&D and interline connecting traffic showed no increase during the same period. The 20 percent increase in Western's on-line traffic between 1970 and 1971 was also higher than the 15.6 percent reflected in the Board's surveys. The problem is compounded with regard to the 1972 on-line figures since the effects of the Northwest strike between June and October 1972 could not readily be quantified.

Similarly the Board's original 18.4 percent participation figure was a reasonably reliable guide to the percentage of Twin Cities-San Diego traffic which was likely to flow over Denver. Continental argues in favor of a 40 percent figure and Judge Goldberg employed a 30 percent figure. However, as noted in the original opinion, the evidence of record indicated that only 6 percent of the Twin Cities-San Diego traffic moved via Denver during a period (such as the forecast period) when Western operated nonstop San Diego-Twin Cities services, but that 40 percent of this traffic moved via Denver when no nonstop service was offered. Use of the 18.4 percent figure for forecasting [J.A. 117] purposes took into account the fact that Western's load factors on the nonstop flights were low and that the carrier could revert to its prior pattern of operating nonstop flights only during select months of the year.

2. The Board properly rejected Continental's claim that Western's "other operating revenue" should be 8.8 percent of passenger revenue rather than the 5.1 percent employed in the Bureau's forecast (according to Continental, such adjustment would add $231,000 in revenues for Western). Continental appears to have relief on an Airwest assertion that the 5.1 percent figure did not include mail and charter revenues (see also I.D. 70-71). However, Western pointed out in its original brief to the Board that the 5.1 percent figure did, in fact, include such revenues for the Denver-San Diego nonstop segment, and that it was merely coincidental that 5.1 percent also represented Western's *systemwide* figure for property revenue only. On this basis, it was concluded that employment of the 5.1 percent figure was sound.

3. The Board properly concluded that there was no need to increase the revenues attributable to "all other beyond traffic" (Continental indicated that such an increase would add $223,000 to Western's gross revenues). See I.D. 71. The argument in favor of an increase in such revenues

apparently rested upon an Airwest exhibit (RW-SR-906) which attempted to predict beyond traffic in the forecast year. In so doing, however, the exhibit assumed, among other things, a blanket 5 percent annual growth rate in all beyond markets. The officially noticeable data available at the time of the Board's decision showed that the growth rates in the two largest markets set out in the exhibits (these markets constituted over 65 percent of the total traffic forecast in the exhibit) were 1.0 percent, and—3.6 percent, respectively, between 1970 and 1971. Thus, there was no evidentiary support for any increase in revenues attributable to "all other beyond traffic."

4. Employment of the 18 percent dilution rate as set forth in the Bureau's estimate was reasonable. Continental assumed that Western's actual experienced dilution rate of 18.4 percent in 1971 was based on a mix of first class and coach traffic only, and argued from this that the rate should be adjusted downward (Continental suggests 12 percent) so as to incorporate Continental's experience with "K" fares which Western indicated it would introduce if Continental were also certificated in the market. See also I.D. 70. (Continental anticipated that such change would increase Western's gross forecast revenues by $667,000.) Contrary to Continental's assumption, however, the 18 percent estimate employed in the Bureau's forecast and adopted by the administrative law judge was based on a mix of first class, economy, and "K" fare traffic (see [J.A. 118] WA-R-201). And, while that 18 percent figure represented, in part, a judgment estimate that 8 percent of Western's traffic would travel at "K" fares, there was no suggestion by Continental that such judgment estimate was in error.[2]

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[2] We appreciate that the Board's decision in Phase 5 of the DPFI to eliminate certain discount fares might have warranted a downward adjustment in the dilution rate by some indeterminate amount. However, there was no evidence in the record upon which to quantify an appropriate adjustment.

5. Continental suggests that Western's operating expenses could have been reduced by about $300,000 if the carrier substituted B-727-200 aircraft for the B-720B utilized for two of its three daily nonstop around trip flights. See also I.D. 73-74. However, the equipment to be operated over a particular route at a particular time depends upon a number of factors, including the availability of other aircraft and the equipment needs on other parts of a carrier's system. As a general rule, each carrier is given broad discretion with regard to the employment of its aircraft. Western argued that it was employing its equipment in the most efficient manner and Continental had not proven that Western was unnecessarily inflating costs by operating equipment clearly unsuitable to the particular route. Thus, predicating Western's operating results on the actual mix of B-720B and B-727 aircraft then in use was reasonable and, at the time, more accurate.

6. Finally, adoption of the 3 percent annual escalation figure by the administrative law judge and the Board was reasonable. (See I.D. 72-72.) Continental asserts that employment of an escalation figure of .5 percent for 1972-1973 would be more appropriate and would reduce Western's expense forecast by almost $100,000.[3] Western argued, on brief to the Board, that its actual expenses increased by just over 7 percent between 1970 and 1971. This assertion strongly suggested that the 3 percent escalation figure originally adopted by the administrative law judge understated—rather than overstated—actual cost increases.

[J.A. 119] *The Forecast for Continental.*

All but about $53,000 of the $827,000 alleged by Continental to have been improperly excluded from its first year

[3] Continental did not request any adjustment in the 3 percent per year figure employed for the 1970-1972 period.

forecast involves traffic in the San Diego-Denver/beyond markets. The basis for rejecting Continental's allegations in this regard was fully explained in the Board's original opinion. Thus, even assuming, *arguendo*, the validity of the remaining adjustments which Continental claims are necessary, this would not have altered the original conclusion that an award of competitive authority would produce—at best—marginally profitable results. However, Continental's petition for reconsideration also points to an increase of $135,000 in gross revenues as a result of a reduction in its dilution factor to 12 percent from the 16 percent set out in the Bureau's forecast. The 16 percent dilution factor was based on Continental's experience. (CO-401B) and was thus reasonable and supported by the record. Adherence to the 16 percent dilution factor turns Continental's projected $53,000 profit into a forecast loss.

[J.A. 120] MINETTI, Member, *dissenting*

My views on the merits of this case have not changed.[1] Accordingly, I would grant the petitions for reconsideration filed by Continental Air Lines and the San Diego, Denver, and Kansas City parties and would award Continental competitive nonstop authority between San Diego and Denver. In my judgment, each successive consideration of this case has made it clearer that competitive service in this substantial market could and undoubtedly would be conducted on a sound economic basis by both carriers; that such service is required in the interests of the traveling public; and that the San Diego-Kansas City market with its significant long-term upward growth trend is entitled to the benefits of first single-plane service which

[1] See my earlier dissents with former Member Murphy in Orders 70-4-46 (April 9, 1970); 71-3-135 (March 23, 1971); 71-4-112 (April 16, 1971—order of remand, concurrence in the result); and 72-12-29 (December 8, 1972).

would result from an award to Continental.[2] At most, the present fuel shortage would lead me to stay the effectiveness of Continental's award for a period.

In calendar 1971 Western carried 85,522 on-line O&D passengers between San Diego and Denver. In 1972 this traffic [J.A. 121] increased 24 percent to 105,978 passengers. In the first seven months of 1973 alone, Western's on-line O&D traffic increased to 70,501 passengers,[3] presaging another very substantial increase for 1973 as a whole. These traffic figures do not include any San Diego-Denver passengers who used carriers other than Western or used connecting service; any passengers on board Western's San Diego-Denver flights who moved beyond San Diego or Denver to or from other points on Western's system; or any prospective stimulation from the introduction of competitive service in the San Diego-Denver market, first single-plane service in the San Diego-Kansas City market, and first single-carrier service in other markets on Continental's system.

These figures make it clear that Bureau Counsel and the Administrative Law Judge were on sound ground, indeed

[2] I do not understand the majority's opinions, either originally or on reconsideration, as holding that benefits to "beyond-market" travelers (such as those in the San Diego-Kansas City market) are not a material factor in determining the public convenience and necessity for the service in issue, or that revenues to be received from such travelers should not be taken into account in assessing the profitability of proposed competitive operations. Any such holding, of course, would depart drastically from many years of Board precedents, and would have to be based on more explanation than a cryptic phrase.

[3] Figures brought to the Board's attention by Continental's motion filed September 14, 1973, based on information furnished by Western pursuant to the prehearing conference order in this proceeding. These most recent figures do not form the basis of my conclusions, but simply serve to confirm conclusions amply supported by evidence already in the record and the findings of the Administrative Law Judge.

conservative, in forecasting a traffic flow of 127,000 passengers for 1973 under conditions of two-carrier competition. For fiscal 1975, which of course would now be the earliest possible first year of competitive operations under an award to Continental, a market of well over 150,000 annual passengers would clearly be in prospect, and the po-[J.A. 122]tential for profitable operations by both carriers could hardly be doubted.[4] I consider these more recent traffic figures a far more reliable indicator of the San Diego-Denver market's potential than the depressed statistics of the 1969-71 era on which my colleagues continue to rely.

I also cannot fail to note the persistence of quite high load factors on Western's San Diego-Denver flights,[5] as well as

[4] Traffic in fiscal 1975, in fact, should be approximately 50 percent higher than that originally forecast for the first year of competitive service by the Admiinstrative Law Judge in the original proceeding (Order 70-4-46), on the basis of which he made a well-substantiated forecast of profitable operations for both carriers.

In view of the comments on pp. 12-13 and Appendix B, p. 3 of the majority's present opinion, I would note that in June of 1973 Western in fact substituted B-727-200's for B-720B's on Flights 603, 543, and 423 (OAG, June 1, 1973). Also, the majority's treatment of the fare dilution issue makes no attempt to quantify the substantially lessened dilution which will unquestionably result from the termination of youth, family and Discover America fares ordered by the Board in Phase 5 of the *Domestic Passenger-Fare Investigation*, as well as from the Board's more restrictive recent policy towards discount fares generally. Overall, it is hard to avoid the impression that the majority is not really interested in whether competitive service would be profitable, and has effectively eliminated this as a decisional factor.

[5] For a recent six-month period (February through July of 1973) Western's nonstop San Diego-Denver coach load factors averaged 63.5 percent, and were over 65 percent in three months out of six, peaking at 70.1 percent in July. Western's eastbound midday Flight 424 had an average coach load factor of just under 80 percent for the six months, dropping below 75 percent only in May and peaking at 87 percent in March. Meanwhile, Western's one-stop flights over Phoenix, referred to earlier by my colleagues

[J.A. 123] some troublesome gaps in its nonstop schedules.[6] These factors, together with the amply documented findings of the Administrative Law Judge, and my own views previously expressed at the several stages of this long-drawn-out proceeding, leave me with an abiding conviction that competitive San Diego-Denver service by Continental is required by the public convenience and necessity.

Like my colleagues, I have taken into account the current fuel shortage, but that circumstance convinces me neither that the present case was correctly decided at its earlier stages,[7] nor that it ought to be decided differently under present conditions. While I have joined in the Board's opinion in the *Atlanta-Detroit/Cleveland/Cincinnati Investigation*, the present case seems to me so clearly distinguishable, on both procedural and factual grounds,

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as providing convenient back-up service in the market, were plagued with considerably higher load factors. On the critical Phoenix-Denver leg, coach load factors averaged 78.4 percent for the six months, dropping below 75 percent only in May and peaking at 84.6 percent in March. (On the San Diego-Phoenix leg load factors for the six months averaged a very healthy 65 percent.) Numerous individual flights showed monthly critical-segment load factors in the 90's or high 80's, making it abundantly clear that passengers in many cases were not being accommodated on the flight of their choice.

[6] According to the May 1, 1974, Official Airline Guide, as appears to be typical of the last year or two, no westbound nonstop flight is scheduled to depart until 10:50 a.m. (arriving 11:50 a.m. PDT), while no eastbound nonstop flight departs after 3:35 p.m. Thus a Denver-originating passenger cannot do more than a couple of hours' business in San Diego and return home on the same day. In June, for the first time, Western proposes to add both an earlier (9:15a.m.) westbound nonstop and a later (8:00 p.m.) eastbound nonstop.

[7] The decision which is here being reconsidered was adopted in December 1972, many months before the present acute fuel shortage came into being. The earlier decisions in this case which to me seem erroneous go back to 1970 (see footnote 1, *supra*).

that I do not believe the *Atlanta* result requires a similar outcome here. The fact that Western will be able in June of this year to schedule four and a half nonstop round trips in the San Diego-Denver market makes it plain, I think, that competitive service in this market is possible without [J.A. 124] materially increasing overall jet fuel consumption or reducing service in other, perhaps more essential markets. The clearly and repeatedly demonstrated need for competitive service convinces me that an award to Continental should be made now. At most, the one concession to the current fuel shortage which I might be prepared to consider justified would be to stay the effectiveness of an award to Continental for some reasonable period, say six months, or until the recognized end of the fuel shortage, whichever first occurs.

/s/ G. Joseph Minetti

72-12-29

[J.A. 83] UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

DOCKET 18104

ADDITIONAL SERVICE TO SAN DIEGO CASE
(San Diego-Denver)

Decided: December 8, 1972

All applications for competitive nonstop authority denied and investigation terminated.

APPEARANCES:

Same as in the supplemental initial decision, and in addition the following:

George C. Pendleton, on behalf of the Wichita Parties.

Opinion

[J.A. 84] BY THE BOARD:

The remanded portion of this proceeding involves the question of whether the public convenience and necessity require the award of first competitive nonstop authority between San Diego, California, and Denver, Colorado and, if so, which carriers should be selected to provide the service. In the original phase of this proceeding the Board, by Order 70-4-46, April 9, 1970, authorized Western Air Lines to provide nonstop service in the San Diego-Denver market but declined to authorize competitive service at the same time. By Order 71-4-112, April

16, 1971, however, the Board reopened and remanded the proceeding to the administrative law judge specifically for the purpose of reexamining the issue of the need for competitive service on the basis of more recent traffic and cost data, as well as Western's actual experience with nonstop service in the market.

Hearings in the reopened phase of the case were held before Administrative Law Judge Hyman Goldberg and his supplemental initial decision was issued on March 20, 1972. He found that nonstop competitive service is warranted and that Continental Air Lines should be selected to compete with Western. His decision to certificate a second nonstop carrier was based on three primary considerations: (1) the market in the forecast years (1972 and 1973) should be large enough to justify competitive nonstop service under normal circumstances; (2) there are serious deficiencies and omissions in the service operated by Western in the market; and (3) both carriers will achieve a substantial operating profit in the forecast [J.A. 85] years, while Western will not suffer harmful diversion as a consequence of an award of competitive nonstop authority. The Board granted discretionary review. On brief to the Board, TWA, one of the applicants for new authority, contends that the record demonstrates no immediate need for competitive service. Similarly, United Air Lines concludes that a reasonable forecast of financial results would show that the costs which would be incurred by competitive service would not be recovered by available revenues. All other parties, except Western, generally approve Judge Goldberg's need for service finding.[1]

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[1] Briefs to the Board were filed by Western Air Lines, Continental Air Lines, Hughes Airwest, Trans World Airlines, United Air Lines, the San Diego Unified Port District, the City of San Diego and the San Diego Chamber of Commerce, and the Bureau of Operating Rights, while the City and County of Denver and

Upon careful consideration of the initial decision, the contentions of the parties, and all the facts of record, we have concluded that the public convenience and necessity would be better served at this time by not authorizing competitive service in this market.[2] Our decision reflects the belief that during a period of lagging traffic growth and retrenchment within the industry, and during the subsequent period of recovery before an adequate upward trend has been assured (both generally and in markets which may be at issue), we must be more than usually careful to avoid impeding the industry's opportunities for full recovery. An unduly optimistic anticipation regarding traffic response on the part of carrier-applicants or the Board can have unfortunate economic effects, even for [J.A. 86] financially healthy carriers, to the detriment of the national air transportation system.[3] In each case, of course, we also bear in mind that the need of the traveling public for air transportation service is a paramount element of the public interest, and that competition ultimately holds the greatest prospect for vigorous development of air transportation. In this connection, we fully appreciate that in other circumstances, and at other times, awards were made in smaller markets, under more optimistic forecasting assumptions, or with somewhat less consideration of an incumbent carrier's scheduling practices during the pendency of a proceeding.[4] Moreover, we are aware that

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the Public Utilities Commission of the State of Colorado adopted its brief to the administrative law judge as its brief to the Board.

[2] Except to the extent modified herein, we adopt as our own the findings and conclusions of the administrative law judge. The supplemental initial decision is attached as an appendix to this opinion.

[3] See, *e.g.*, Application of Continental Air Lines, Order 72-5-72, May 19, 1972.

[4] As noted above, however, the circumstances of this reopened case are highly unusual and an important purpose of our remand was to examine the need for competitive service in light of Western's actual experience with nonstop operations.

certain indicators now point to a trend away from the economic picture of the recent past. In these circumstances, we believe we should analyze the unique need of each market for service within an atmosphere of caution and restraint to insure that a proper balance is struck between the needs of the traveler or shipper and the effect which a competitive award might have on the air transportation system and on the public who in the end can only be served by the maintenance of a healthy industry.

There is little question that the San Diego-Denver route offers a potential for future certification of competition. However, in the circumstances of this case—where Western's service has been, and appears likely to be, reasonably responsive to the needs of the market, and where the traffic growth in the local San Diego-Denver market, and the beyond markets which would support much local operations, show no strong sign of improvement—we believe it imprudent, on balance, to certificate a second nonstop carrier where competitive service is likely to produce, at best, only marginal financial results.[5]

[J.A. 87] *Quality of Service*

We believe that Western's historic efforts to satisfy the demands of the local market have been fairly satisfactory. As Judge Goldberg notes in his supplemental initial decision (pp. 14-16) the carrier has increased its frequencies, introduced modern equipment, and generally upgraded its service since it received single-plane authority at the end of 1957. In reviewing Western's recent nonstop performance, however, the initial decision suggests that local passengers have not received the quality and quantity of service to which they are entitled, noting (1) high load factors on certain flights, (2) insufficient frequencies and

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[5] See also Phoenix-Seattle/Portland Nonstop Case, Order 70-8-13, August 5, 1970, at 3-4; Cf: Service to Salt Lake City Investigation, Order 70-8-1, August 3, 1970, at 7.

undesirable schedule times, and (3) the operation of San Diego-Denver service as part of a long-haul operation. We do not share Judge Goldberg's appraisal of the evidence.

A. *Load Factors*

Western began its nonstop service with morning and evening departures in both directions (flight 474 departed San Diego at 8:05 AM, flight 421 departed Denver at 8 AM, flight 426 left San Diego at 5:15 PM, and flight 425 left Denver at 6:30 PM). As the initial decision recognizes, however, flights 421 and 426 operated at extremely low load factors during the first seven months of service ended December 30, 1970; as a result on January 5, 1971, Western replaced them with two mid-day departures (replacement flight 603 departed San Diego at 3:50 PM and flight [J.A. 88] 543 left Denver at 11:55 AM). These replacement flights produced some improvements in load factors but, significantly, average load factors (except for the predictable summertime increase) continued to remain modest. See I.D. Appendix 6, page 1. In our judgment, the emphasis in the initial decision on pre-January 1971 schedules to support the interrelated findings that high load factors on certain flights indicate substantial passenger inconvenience, while low load factors on other flights indicate poor scheduling (I.D. 61-64), presents a somewhat unrepresentative picture of Western's overall nonstop load factor and scheduling experience. Western's reserved-seat load factors for the overall record period June 1970-February 1972 (*i.e.*, including the period followng schedule changes in January 1971), show that average load factors were only 43 percent nonwithstanding the schedule changes.[6]

[6] In this connection, footnote 35 of the initial decision is somewhat misleading as it suggests that the original flights 426 and 421 had attained overall load factors of 65.7 percent and 65.5 percent (and on-board coach load factors of 69.7 percent and 74.5 percent) respectively "when this schedule was changed." Load factors on these fiights on the January 5 date of the schedule change—reflecting the post New Year traffic surge during the first few days of January—are not representative of load factors which might be anticipated for January had a full month's pattern of service been operated.

Similarly, the proper standard for load factor evaluation is the reserved-seat load factor, not the on-board load factor, since the purported purpose of standby fares is to fill otherwise empty seats. In short, we believe that the record as a whole shows that there has been ample nonstop capacity for existing traffic demand. The addition of a third nonstop round trip in June 1972 should accommodate whatever traffic increases are likely to occur in the near future.

[J.A. 89] We would note, in this connection, that the Board recently concluded that a reasonable long-range industry load-factor standard should be at least 55 percent for rate-making purposes.[7] We are not suggesting that such industry- load-factor standards for rate-making purposes should determine decisions with regard to competitive route authorizations in particular markets, or that the same measure must necessarily govern rate and route questions. Use of on-board load factors, for example, is more appropriate for rate-making purposes although reserved-seat load factors more accurately reflect the true demand for seats in the context of evaluating the need for service. Nonetheless, we believe that the exposure to competition should be carefully measured where—as here—an incumbent carrier's load factors are substantially below the recommended industry standard.[8]

[7] Domestic Passenger-Fare Investigation, Phase 6B (Load Factor), Order 71-4-54, April 9, 1971.

[8] The Board has, on occasion, concluded that competitive service was warranted notwithstanding modest load factors.

B. *Schedules*

We are unable to endorse Judge Goldberg's view that Western's nonstop schedules are ill-timed. In the first place, we believe that his concern that only one flight in each direction operates at "prime" times (I.D. 60) does not fully consider that the attractiveness of San Diego-Denver schedules cannot be measured in terms of what might constitute "peak period" departures in other markets. An important portion of San Diego-Denver traffic, after all, consists of non-business travelers. See Brief of San Diego Parties, pp. 6-7. A significant partion of the traffic also utilizes the flights for connecting service at Denver. Historically, upwards of 25 percent of the market makes interline connections (I.D. Appendix 2.) and an additional percentage, of course, makes on-line connections. These factors [J.A. 90] are complicated by the fact that San Diego-Denver flights operate across the time zone between the Rocky Mountains and the Pacific Coast. Thus, the mid-afternoon eastbound departure and the mid-afternoon westbound departure are really more responsive to the needs of the traffic than so-called "prime time" departures might be. A review (pp. 4-5, *supra*) of the load factors on Western's initial evening "prime hour" flight to Denver and the morning "prime hour" flight to San Diego constitutes strong evidence of this fact. Secondly, the indication that there is no eastbound service "for a period of 16 hours" (I.D. 59) is less compelling when it is considered that much of that 4 PM-8 AM period is during the night, and that any significantly later departure would not—because of the time change—allow for reasonable connecting opportunities at Denver. The valid concern over a lack of westbound service between 11:20 AM and 5 PM (I.D. note 118) has been obviated by the recent institution of a mid-afternoon westbound nonstop flight. In short, contrary to the initial decision, we find that the current scheduling pattern is reasonably well suited to the needs of the traffic.

C. *Long-Haul Service*

Finally, we note no significant problems flowing from the fact that Western operates its San Diego-Denver service as part of a long-haul pattern. The primary faults with long-haul service, after all, are usually that local schedule needs are compromised, that seats are not available for local traffic, and that there is a potential for disruption in the operation of flights due to difficulties at distant points.[9] Clearly the San Diego-Denver market represents an important one for Western so that its schedules, as noted above, are [J.A. 91] geared largely to the needs of passengers traveling over the San Diego-Denver segment. Moreover, nonstop seats are available. And, lastly, the carrier's performance factor and on-time record are good. Few nonstop flights were canceled (I.D. 16) and Western's on-time performance is above the trunkline average. (Western's Brief to the Board, Appendix B.)

Finally, the Board recognizes that Western did not, until June, 1972, offer the last of the three daily round trips which it proposed in the original phase of this proceeding. However, in view of lagging traffic growth generally, and the modest traffic response to the original two-daily-round-trip pattern, we do not find that Western's action warrants serious criticism.

Traffic Growth and Profitability

We believe that the prospect for profitable two-carrier operation is tenuous at this time. The administrative law judge accepted as reasonable the Bureau's forecast of 127,409 passengers in 1973 (348 per day) and characterized this projection as sound and conservative.[10] The Bureau's

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[9] See Dallas/Fort Worth-Phoenix Nonstop Service Case, Order 69-7137, July 24, 1969, note 3 and accompanying text.

[10] Among the carrier parties, the market size was forecast for 1973 between a low of 101,893 (United) and a high of 132,701 (Airwest).

forecast employed a traffic base premised on Western's on-line traffic (rather than O&D and connecting traffic), used a 7.5-percent annual growth rate, estimated stimulation at 15 percent on the basis of QSI, and assumed that 30 percent of the current San Diego-Twin Cities traffic would travel on Western's San Diego-Denver flights and serve to support Western's service. We believe this forecast is too optimistic.

To begin with, we would not use the 7.5-percent annual growth rate. According to the Board's surveys, the growth rate since 1968 has been declining, *i.e.*, 7.5 percent for 1968-[J.A. 92] 1969, and 0 percent for 1969-1970. The 1970-1971 increase of 11.6 percent can be attributed to the stimulation of Western's new nonstop service, with true growth, for all practical purposes, again at about 0 percent. Thus, over the last two years, there has been virtualy no true traffic growth, and only 2.5-percent annual growth since 1968. Consequently, the Board considers a 3-percent growth rate for 1972 and 1973 far more realistic.

Moreover, a projection of 15-percent stimulation based on QSI appears high in light of recent experience in the market. The Board's original estimate (based on a Bureau QSI forecast) projected stimulation at 33 percent for Western's proposed three-daily-round-trip-nonstop pattern but Western's new service increased traffic only 15.6 percent. Even adjusting for the two-round-trip-a-day pattern actually operated, the new service should have produced stimulation in the 20-25-percent range. The Board is inclined therefore to discount the current prediction of 15-percent stimulation based on a similar QSI estimate for Continental's proposed nonstop competitive service. This judgment is reinforced by the belief that such bleedoff traffic as may have been appropriately included in the Board's original forecast (when only one-stop San Diego-Denver service was available) has been largely recaptured since Western inaugurated its nonstop service. A 10-percent figure would appear more reliable.

[J.A. 93] Lastly, we would not employ Western's Fiscal 1971 traffic figures as a base in constructing the local traffic forecast. As the Board had occasion to note recently, it has been our uniform practice to express the primary market traffic in terms of true O&D and inter-line connecting passengers because these passengers would be more o rless equally accessible to all carriers operating in the market.[11] Additional on-line traffic, to the extent it can accurately be quantified, is more appropriately included as traffic support for a particular carrier. Thus, we do not find that the use of O&D and connecting data as a base either "understates" the market or is otherwise less reliable as suggested in the initial decision (I.D. 56-57). In addition, we believe that the two remaining reasons advanced by Judge Goldberg for rejecting the traditional approach in this case—that Western's on-line data are more current and that O&D data include a strike period—have been obviated by our utilization of calendar 1971 data.

Assuming only the adjustments described above, but otherwise using the Bureau's forecast assumptions, there may well be a reduction of 16,000 passengers for Western in the local market and a commensurate reduction of anticipated gross revenues (based on a 55:45 split in participation) of $850,000. Even a modest increase in traffic to reflect any additional on-line passengers which might not be included in the forecast would not substantially alter this prospect. Moreover, there is also likely to be a reduction of 13,000 passengers for Continental and a reduction in gross revenues of over $750,000.

[J.A. 94] A similar—and equally troublesome—picture emerges in the major beyond markets. A review of the growth pattern in Western's primary beyond market, for example (San Diego-Twin Cities), reveals that since 1969 the total market has declined every year—from 12,730 O&D and con-

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[11] Cf: Alaska Service Investigation, Order 72-1-94, January 26, 1972, p. 6.

necting passengers in 1969 to 46,970 in 1971. Thus, even the Bureau's projected 5-percent growth rate is highly doubtful. Similarly, a review of the O&D surveys for the 1970-1971 period for the beyond markets which Continental proposes to serve reveals that only Colorado Springs—with 3,690 passengers in 1971 (10 per day)—experienced growth over calendar 1969 and 1970. Even that growth was a mere 3.7 percent. Moreover, the Bureau's estimate that 30 percent of the Twin Cities beyond traffic would travel over Denver contemplated that no nonstop service would be operated in the San Diego-Twin Cities market. As the Bureau points out, Western carried about 40 percent of its Twin Cities traffic via Denver during the period when no nonstop service to the Twin Cities was offered, but carried only 6 percent of such traffic via Denver during the period when it also operated nonstop service between San Diego and the Twin Cities. A witness testified that Western would institute and maintain nonstop service on a more or less indefinite basis beginning in the middle of 1972 (Tr. 488-489) and the carrier, in fact, has done so (see OAG Nov. 1, 1972). Although we appreciate that Western can eliminate that nonstop service, nonetheless reliance on the Bureau's 30-percent figure seems too chancy at this time.

[J.A. 95] Assuming only a 3-percent growth rate in the Twin Cities market, and utilizing (for forecasting purposes) the 18.4-percent Twin Cities participation which the Board projected in its original order on remand, Western's beyond traffic could be reduced by 9,600 passengers and beyond revenues could be more than half a million dollars below that predicted by the Bureau, while the Bureau's estimate of Continental's beyond traffic could be overstated by about 7,000 beyond passengers, and its beyond revenues could be about $700,000 too high. These prospects seriously challenge the conclusion that two-carrier competition would be successful.[12]

[12] A number of assumptions made by the Bureau—*e.g.*, stimulation in markets which have service comparable to that which

Other Considerations

We have also examined beyond-segment benefits and the potential for carrier strengthening or operational flexibility insofar as these are relevant aspects of the public convenience and necessity.[13] As we have noted throughout this opinion, both the local and major beyond markets have been characterized by a paucity of growth and, with this backdrop, the Board does not conclude that the potential first single-plane service for Kansas City-San Diego passengers (the San Diego-Kansas City market generated 29 passengers per day in each direction in 1971) and additional single-carrier service outweigh the other considerations detailed above. The Board believes that the demand of a second market should not be the justification for awarding competitive service in the primary market at issue here. Likewise, the local service carrier applicant cannot offer any impressive beyond-segment benefits and, overall, we do not believe that there is any probability of subsidy reduction.

[J.A. 96] Accordingly, in view of the foregoing, and all the facts of record, we find that:

1. The public convenience and necessity require the denial of all applications for competitive nonstop authority in the San Diego-Denver market at this time; and

2. All applications, requests, and motions involved herein should be denied and the investigation should be terminated.

An appropriate order will be entered.

BROWNE, Chairman, GILLILLAND, Vice Chairman, and TIMM, Member, concurred in the above opinion. MINETTI and MURPHY, Members, filed the attached dissent.

Continental would provide—are also subject to question. We find it unnecessary, however, to attempt to quantify our doubts in these areas.

[13] See Chicago-Baltimore Nonstop Service Investigation, Order 71-9-64, September 16, 1971.

[J.A.97] MINETTI AND MURPHY, Members, *Dissenting:*

We cannot agree with the decision of the majority of the Board. We stated in our dissents to the Board's previous decisions (Orders 70-4-46 and 71-3-135) that competitive nonstop service in the large San Diego-Denver market is required by the public convenience and necessity and that Continental Air Lines should be selected to compete with Western. The Administrative Law Judge, on the basis of more recent evidence in the remanded proceeding, reaches the same conclusion—so does the Bureau of Operating Rights. Our own review of the present record on remand only serves to confirm the position we earlier expressed. For the reasons stated by the Administrative Law Judge and those expressed in our previous dissents, we continue to be of the opinion that Continental should be authorized to provide nonstop service in the San Diego-Denver market.

/s/ G. JOSEPH MINETTI

/s/ ROBERT T. MURPHY

APPENDIX

[J.A. 98] DOCKET 18104

THE ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION REFERRED TO HEREIN IS NOT ATTACHED TO THIS COPY BECAUSE OF THE WIDE CIRCULATION GIVEN AT THE TIME OF ITS RELEASE. THE INITIAL DECISION IS ATTACHED TO THE ORIGINAL OF THE BOARD'S OPINION AND TO THE OFFICIAL COPIES AND TO THE OFFICIAL COPIES IN THE BOARD'S FILES AND MAY BE EXAMINED THERE. IT WILL ALSO BE PRINTED AS PART OF THE OFFICIAL "CIVIL AERONAUTICS BOARD REPORTS."

Order 72-12-29

[J.A. 99] UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D.C.,
on the 8th day of December, 1972

ADDITIONAL SERVICE TO SAN DIEGO CASE
(San Diego-Denver)

DOCKET 18104

Order

A full public hearing having been held in the above-entitled proceeding, and the Board having issued its opinion containing its findings, conclusions, and decision, which is attached hereto and made a part hereof;

IT IS ORDERED THAT:

1. All applications for competitive nonstop authority be and they hereby are denied;

2. All petitions, motions and other requests involved herein be and they are hereby are denied, and this investigation is terminated.

By the Civil Aeronautics Board:

HARRY J. ZINK
Secretary

(SEAL)

[J.A. 530] UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

REMANDED ADDITIONAL SERVICE TO SAN DIEGO CASE
(SAN DIEGO-DENVER)

DOCKET 18104 *et al.*

Certificate of Continental Air Lines, Inc., for route 29, amended so as to add a new segment extending between the terminal point Denver, Colo., and the terminal point San Diego, Calif.

Decision of the Board in Order 70-4-46, April 9, 1970, to the extent that it denied applications of Hughes Air Corp. (Air West), Trans World Airlines, Inc., and United Air Lines, Inc., for certificated nonstop authority between Denver, Colo., and San Diego, Calif., affirmed.

Except to the extent granted, petitions for reconsideration of Order 70-4-46, April 9, 1970, which were deferred in Order 70-6-43, June 5, 1970, denied. This proceeding terminated.

Appearances:

Richard A. Fitzgerald and *John W. Simpson* for Hughes Air Corp. (Air West).

Lee M. Hydeman and *James T. Lloyd* for Continental Air Lines, Inc.

Joseph B. Goldman for Frontier Airlines, Inc. (Rule 14 participant).

Edmund E. Harvey for Trans World Airlines, Inc.

William M. Dickson for United Air Lines, Inc.

Ernest T. Kaufmann and *Gilbert L. Amyot* for Western Air Lines, Inc.

Tedford Dees for the city and County of Denver, Colo., and the Public Utilities Commission of the State of Colorado.

Nordahl E. Holte for the City of Kansas City, Missouri, and the Chamber of Commerce of Greater Kansas City.

Joseph D. Patello for the San Diego Unified Port District, the City of San Diego, California, and the San Diego Chamber of Commerce.

J. Michael Roach for the Buerau of Operating Rights, Civil Aeronautics Board.

[J.A. 531] **Supplemental Initial Decision of Hyman Goldberg.**

Preliminary Statement

The basic question in this reopened and remanded proceeding is whether competitive nonstop service should be certificated between San Diego, Calif., and Denver, Colo., and if so, whether Hughes Air Corp. (Air West), Continental Air Lines, Inc., Trans World Airlines, Inc., or United Air Lines, Inc., should be selected for the award.

In his initial decision in the original proceeding, the examiner concluded, among other things, that two carriers should be certificated for San Diego-Denver nonstop service, that Western Air Lines, Inc., and Continental should be selected for the nonstop authorizations, and that the applications of Air West, TWA, and United should be denied. By Order 70-4-46, April 9, 1970, the Board, *inter alia*, sustained the award to Western; however, finding that the need for a competitive nonstop authorization at the time had not been demonstrated, the Board denied the applications of Air West, Continental, TWA, and United.[1]

[1] Members Minetti and Murphy in their concurring and dissenting opinion agreed with the examiner that a competitive authorization was required, that Continental should be granted such authorization, and that the applications of Air West, TWA, and United should be denied.

Thereafter, by Order 70-6-43, June 5, 1970, the Board deferred action on petitions for reconsideration filed by Air West, Continental, the Denver and Colorado Parties, and the San Diego Parties, to the extent that these petitions sought authorization of a second unrestricted nonstop carrier between San Diego and Denver, and allowed Western's amended certificate for route 35 containing the San Diego-Denver nonstop award to become effective. By Order [J.A. 532] 71-3-135, March 23, 1971, the Board denied the deferred petitions and affirmed its original decision not to authorize competitive San Diego-Denver nonstop service at that time.[2] However, by Order 71-4-112, April 16, 1971, acting upon its own initiative, the Board vacated Order 71-3-135 and reopened and remanded the proceeding to the examiner for a further hearing on the issue of whether the public convenience and necessity require competitive nonstop service between San Diego and Denver and, if so, which carrier or carriers should be selected for such authority.[3] The Board further directed the examiner to issue a supplemental initial decision on the San Diego-Denver issue.[4]

Order 71-4-112 was followed by filings by Western[5] and

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[2] Members Minetti and Murphy, again dissenting, adhered to their earlier view that Continental should be certificated for competitive San Diego-Denver nonstop service.

[3] Members Minetti and Murphy concurred in the result.

[4] In addition, the Board ordered that all parties to the original proceeding shall be parties to the reopened and remanded proceeding. However, by Order 71-6-33, issued by the examiner under delegated authority on June 7, 1971, participation as parties was limited to Air West, Continental, TWA, United, Western, the Denver and Colorado Parties, the City of Kansas City, Mo., the San Diego Parties, the City and Chamber of Commerce of Witchita, Kansas, the Department of Defense, and the Bureau of Operating Rights.

[5] Western filed a "Motion for Modification of the Issues" and a "Contingent Motion to Consolidate." In the first motion Western

TWA.[6] By Order 71-7-34, July 7, 1971, the Board denied the motions of the two carriers. However, the Board stated that the parties remained free to introduce evidence and to argue for or against the imposition upon any award of restrictions deemed necessary to avoid competitive impact or prejudice to excluded applications.

[J.A. 533] After due notice, a prehearing conference and a public hearing were held. Statements of position and briefs were submitted by Air West, Continental, TWA, United, Western, the Denver and Colorado Parties, the Kansas City Parties, the San Diego Parties, and the Bureau; a brief was filed by the Wichita Area Chamber of Commerce; and a statement of position was provided prior to the close of the hearing by Frontier Airlines, Inc., appearing under Rule 14 of the Board's Rules of Practice.[7] The positions set forth in these documents are summarized in Appendix 1 attached hereto. This proceeding now stands submitted to the examiner.

Based upon a consideration of the record and the arguments of the parties, the examiner concludes, as he concluded in the original phase of this case, that the public convenience and necessity require the authorization of a second nonstop carrier between San Diego and Denver

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requested the Board to modify the issues in the remanded proceeding so as to impose a pretrial restriction prohibiting San Diego-Denver nonstop flights under any new award from also serving Kansas City or Chicago. In the second motion Western requested the Board, in the event of denial of the first motion, to consolidate its concurrently-filed application for nonstop Denver-Kansas City and Denver-Chicago segments, subject to a San Diego long-haul restriction (Docket 23441).

[6] TWA filed a "Contingent Motion to Consolidate" requesting the Board, in the event of denial of Western's motion for modification of the issues, *supra*, to consolidate TWA's concurrently-filed application for a nonstop San Diego-Kansas City segment (Docket 23484).

[7] A brief was also filed by Frontier, but such filing is not authorized by Rule 14.

on an unrestricted basis and that Continental should be selected over Air West, TWA, and United for the additional nonstop authorization. The examiner further concludes that the amended certificate granted to Continental for unrestricted San Diego-Denver nonstop service should carry the usual effective date fixed in route cases rather than the January 1, 1973 effective date proposed by the Bureau.

[J.A. 534] *The San Diego and Denver Communities*

Both San Diego and Denver are large and growing communities. As of 1970, San Diego had a metropolitan area population of 1,357,854, representing an increase of 31.4 percent over its 1960 population total as against an increase of 13.3 percent in the nation's population during the same decade. San Diego had the 5th fastest growth rate in the 1960-1970 decade among 24 United States metropolitan areas having a population of over one million in 1960, and the most rapid growth rate of any of these metropolitan areas lying in the western third of the United States. Denver in 1970 had a metropolitan area population of 1,252,100, and was the largest community in the eight-State Rocky Mountain Census Region consisting of Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming. The 1970 population total is an increase of more than 30 percent over Denver's 1960 population.

San Diego and Denver are major tourist attractions. San Diego has the appeal of ideal weather conditions throughout the year and the proximity of the ocean and mountains which have produced a steady and rapid growth in tourist expenditures over the past 20 years. In 1970, such expenditures in San Diego amounted to $381,827,000, and approximately 11 percent of the San Diego tourists came from the mountain states of which Denver is the major hub. Denver itself is one of the major ski centers of

the nation; with its mountains, winter sports, and scenic attractions, it is an attraction for visitors from San Diego.

In conjunction with tourist attractions, San Diego has developed ino a major site for conventions. A total of 551 conventions were held in San Diego in 1970, with 343,825 delegates attending these conventions. The 1972 Republican National Convention is scheduled to be held in San Diego.

[J.A. 535] Tourism and convention activity have generated a thriving hotel/motel industry. In 1970 there were 25,570 hotel/motel rooms in the San Diego area. Some 30 hotels comprising 8,737 rooms alone have a combined capacity to accommodate 20,386 persons for meetings and 15,670 for banquets; over 5,000 of these rooms were added between 1967 and 1970.

San Diego[8] and Denver are large air stations. In 1969, San Diego generated a total of 3,117,002 local O&D passengers, including 1,825,730 passengers shown by the Board's O&D surveys and 1,291,272 PSA passengers; this passenger generation total made San Diego the 19th ranking city in the United States in terms of production of O&D traffic. Further, among 22 large hubs in the United States, San Diego had the second most rapid growth rate between 1968 and 1969,[9] with an increase of 12.45 percent; this compares with an increase of 5.28 percent for the 22 hubs as a group and an increase of 5.1 percent for the United States. It further appears that PSA enplanements

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[8] San Diego is currently served by the six Federally certificated air carriers (Air West, American, Delta, National, United, and Western) and two air carriers certificated by the State of California for intrastate service (Pacific Southwest and Air California). A substantial number of additional air carriers and foreign air carriers maintain sales offices in San Diego.

[9] From 1,433,570 enplaned passengers (including 578,848 PSA passengers) in 1968 to 1,612,095 enplaned passengers (including 645,636 PSA passengers) in 1969.

at San Diego exceed those of any other carrier serving San Diego, with PSA generating 40.0 percent of the total San Diego enplanements in 1969.[10] Apparently, also, all of the seven San Diego carriers (including PSA) experienced increases in San Diego enplanements between 1968 and 1969, ranging from National's high of 65.9 percent to United's low of 6.5 percent. Other data which include scheduled intrastate operations at San Diego show that there were [J.A. 536] 3,341,291 San Diego passengers in 1970, which was an increase of 0.6 percent over 1969; that between 1965 and 1970 the compound annual growth rate was 15.4 percent; and that in the first six months of 1971, San Diego generated 1,611,948 passengers compared to 1,567,927 in the first six months of 1970, which was an increase of 2.8 percent.[11] Additional data indicate that scheduled domestic and international enplanements at San Diego rose from 856,000 in 1968 to 998,000 in 1970, or a two-year gain of 16.6 percent and an annual gain of 8.0 percent; similar enplanements of 11 trunks and nine local service mainland airlines increased from 147,997,000 in 1968 to 154,466,000 in 1970, or a two-year increase of 4.4 percent and an annual growth of 2.2 percent.

On the other hand, based upon the Board's traffic surveys, San Diego's total O&D and connecting passengers declined 0.8 percent from 2,284,250 passengers in fiscal year 1969 to 2,266,320 in fiscal year 1970, and declined 6.5 percent from the first six months of 1969 (1,103,870 passen-

[10] United 347,105 enplanements (21.5 percent), American 266,796 (16.6 percent), Western 229,245 (14.2 percent), Delta 47,792 (3.0 percent), National 41,225 (2.6 percent), and Air West 34,296 (2.1 percent).

[11] Excluding passengers enplaned by the California intrastate carriers, the record shows that passengers enplaned by the trunk carriers at San Diego increased 0.2 percent from 933,000 in 1969 to 935,000 in 1970, and that there was a decrease of 4.4 percent between the first six months of 1970 (436,000 passengers) and the same period of 1971 (417,000 passengers).

gers) to the first six months of 1970 (1,032,410 passengers), as compared to a domestic industry gain of 2.3 percent between fiscal 1969 and fiscal 1970 and a loss of 1.8 percent between the first six-month periods of 1969 and 1970. Also, based upon CAB Form 41 data, San Diego's domestic scheduled passenger enplanements increased 13.4 percent between 1968 (853,018 passengers) and 1969 (967,109 passengers), but declined 0.2 percent between 1969 and 1970 (965,015 passengers), 2.9 percent between the year ended March 31, 1970 and the year ended March 31, 1971, and 1.6 percent between the year ended June 30, 1970 and the year ended June 30, 1971.

[J.A. 537] Finally, as to San Diego's traffic-generating capacity, there is evidence indicating that the Board's O&D traffic surveys underestimate actual San Diego traffic. Apparently, some San Diego passengers travel by intrastate air carriers to Los Angeles for flights and others proceed by surface transportation to Los Angeles, and are reflected in the Board's surveys as Los Angeles passengers rather than San Diego passengers. However, the record does not quantify the volume of such "lost" traffic.

As for Denver, that community ranks first among air stations in the 8-State Rocky Mountain region in all the usual indicators of station size, including O&D passengers and passenger-miles, enplaned domestic passengers, and aircraft departures. In 1969, Denver generated 3,850,450 O&D passengers, which gave it a ranking of 15th among U.S. cities in local O&D passenger production. Among 22 large hubs in the United States, Denver had the fastest growth rate between 1968 and 1969—14.01 percent measured in terms of enplaned passengers.[12] In fiscal year 1970, Denver generated a total of 3,860,420 O&D passengers, representing 1.74 percent of the U.S. total, and its percentage of the U.S. O&D passenger total has risen stead-

[12] From 2,936,123 enplaned passengers in 1968 to 3,347,514 in 1969.

ily since 1950. Denver's domestic enplaned passengers in fiscal year 1970 totalled 3,517,428, or 9.6 percent greater than in fiscal year 1969 (3,208,136); its domestic enplaned passengers in the first six months of 1971 (1,801,819) was 5.9 percent greater than in the comparable period of 1970 (1,700,810). Other data show that Denver's scheduled passenger enplanements increased from 2,936,000 in 1968 to 3,610,000 in 1970, which is a two-year growth of 23.0 percent or 10.9 percent annually.

[J.A. 538] Additionally, the Board's traffic surveys indicate that Denver's total O&D and connecting passengers grew from 5,717,840 in fiscal year 1969 to 5,956,650 in fiscal year 1970, or 4.2 percent; and that there was a decline of 1.3 percent in such traffic from the first six months of 1969 (2,804,480) to the same period of 1970 (2,766,650). CAB Form 41 data show that Denver's passengers enplaned by trunk carriers in scheduled service grew from 2,765,000 in 1969 to 2,860,000 in 1970, or 3.4 percent; and that there was a growth of 4.9 percent in such traffic from the first six months of 1970 (2,328,000) to the comparable period of 1971 (1,393,000).

Furthermore, upon the basis of 1969 CAB survey data, Denver is the sixth largest interline transfer point of domestic passengers in the United States, producing 1,661,050 interline connecting passengers; Denver in this respect is exceeded only by Chicago, Atlanta, Dallas, Los Angeles, and Washington, D.C., and exceeds New York, St. Louis, San Francisco, and Pittsburgh, among other major hubs.[13] Denver also has the 4th highest ratio of domestic interline connecting passengers to true O&D passengers, namely, 43 percent (in 1969), with only Atlanta, Dallas, and Chicago having larger ratios.[14] Thus, airline

[13] Denver ranked 7th each year from 1959 through 1968, and advanced to 6th place, ahead of New York, in 1969.

[14] Denver's ranking in terms of this ratio has been 4th continuously each year beginning in 1964.

services at Denver draw connecting traffic support from Denver connections in larger numbers than all but five stations in the country and in larger proportions than all but three stations in the country.

[J.A. 539] *The San Diego-Denver Market: Traffic and Service Data*

1. *General.* The San Diego-Denver market, nonstop, is 840 miles long, and onestop via Phoenix, 894 miles. Western is the only carrier certificated to serve the market nonstop, having inaugurated such service on June 8, 1970 pursuant to its award in the initial phase of this case. Western is also certificated to serve the market onestop via Phoenix, and does so under an award in the Service to Phoenix Case in 1957.[15] United is the only other carrier authorized to operate single-plane service in the market, which it can do via a mandatory stop at Los Angeles by tacking of two certificated authorizations.

Based upon fiscal year 1970 local O&D passenger data, the San Diego-Denver market is San Diego's ninth largest market and its largest market without nonstop competition; it is Denver's 21st ranking market and the largest Denver market without competitive nonstop authority. The evidence further shows that the San Diego-Denver market is Western's largest monopoly market, and that it is larger in passenger volume than the San Diego-Washington, D.C./Baltimore market which was certificated for competitive nonstop service in the original phase of this case.[16]

[J.A. 540] 2. *C.A.B. Passenger Survey Data.* In fiscal year 1970, as shown by the Board's traffic surveys, the San Diego-

[15] 25 C.A.B. 647.

[16] According to fiscal year 1970 data, the San Diego-Denver market generated 70,430 O&D and connecting passengers compared to 70,040 such passengers moving in the San Diego-Washington, D.C./Baltimore market.

Denver market generated a total of 70,430 passengers (193 passengers per day), consisting of 50,840 local O&D and 19,590 connecting passengers. This total represents a slight increase over the total of 69,520 passengers (48,560 local O&D, 20,960 connecting) or 190 passengers per day generated in calendar year 1969.[17] It further appears that in fiscal 1970, as in calendar 1969, Western carried approximately 80 percent of the total market and United approximately 12½ percent.[18] Western's share of online passengers moving in the market was even larger, 86.1 percent in fiscal 1970 and 86.3 percent in calendar 1969.[19] In the second quarter of calendar 1970, when the market generated 16,970 online passengers, Western's share mounted to 91.0 percent (15,450 passengers).

[J.A. 541] A breakdown of San Diego-Denver local O&D passengers by quarter, March 1968 through June 1970, is set forth in Appendix 2 attached hereto.[20] This breakdown shows that the market generated 38,180 local O&D passengers in the nine months ended June 30, 1969, representing an increase of 5,090 passengers or 15.4 percent.[21] Since

[17] See Appendix 2, page 1, attached hereto for a breakdown, year by year, of local O&D and connecting traffic, calendar 1966-fiscal 1970. It should be noted that there was a Western strike in the third quarter of 1969 (from July 29 to August 15), thus affecting the market traffic totals in calendar 1969 and fiscal 1970.

[18] See Appendix 2, page 2, attached hereto. Western's share of the total market declined somewhat in these years from its historic share in the 1964-1968 period, apparently because of a strike in the third quarter of 1969. In the second quarter of 1970, Western carried 87.0 percent of the total market and United 8.2 percent (total market 17,750 passengers, Western 15,450 pasengers, and United 1,450 passengers).

[19] See Appendix 2, page 3, attached hereto. United's share of the total online traffic was 13.6 percent in fiscal 1970 and calendar 1969.

[20] At page 4.

[21] The comparison is made on a nine months' basis rather than a fiscal year basis in order to exclude the third quarter of 1969 when Western was on strike.

Western did not commence nonstop operations between San Diego and Denver until June 8, 1970, these data for all practical purposes do not reflect any significant stimulative effect due to Western's nonstop service.

As indicated by the Board's traffic surveys, the San Diego-Denver market generates a large number of interline connecting passengers, and the ratio of such passengers to local O&D passengers over the years has been substantial.[22] In fiscal year 1970 the ratio was 38.5 percent; for calendar 1969, there was a ratio of 43.2 percent.

3. *Western's Passenger Data.* Attached as Appendix 3 [23] is a table showing, on a monthly basis, the number and class of San Diego-Denver online O&D passengers Western has carried since January 1969. According to this table, Western carried 60,688 such passengers in 1969 (its operations were suspended July 29-August 15 due to a strike), 74,114 in 1970, and 70,150 in the first 10 months of 1971 (on an annualized basis, 84,180). First-class and coach traffic represented 5.6 percent and 94.4 percent, respectively, in 1970, and 4.4 percent and 95.6 percent, respectively, in the first 10 months of 1971.

[J.A. 542] It further appears from the table that there was an increase of 22.1 percent in Western's online passengers from 1969 (a strike year) to 1970; from 1970 to 1971 (10 months, annualized), the increase was 13.6 percent. On a fiscal year basis, there was an increase of 34.5 percent, from 60,939 passengers in fiscal 1970 (a strike year) to 81,969 passengers in fiscal 1971. Looking at the latest 12-month periods for which data are available, there was a smaller increase, namely, 18.0 percent, from 71,296 passengers in the 12-months ended October 31, 1970 to 84,096 passengers in the 12-months ended October 31, 1971. Comparing periods in 1970 and 1971 in which Western operated nonstop service

[22] See Appendix 2, page 5, attached hereto.

[23] At page 1.

throughout, there was still a smaller increase—7.5 percent, from 29,321 passengers in the 4-month period July-October 1970, to 30,447 passengers in the July-October period of 1971.

Focusing on the period since Western's 1969 strike and comparing online passenger totals by month in 1969, 1970, and 1971,[24] there was an increase in every instance between September 1969 and October 1971. However, the size of the monthly increase dropped to a level below 10 percent beginning with July 1971 and continuing through October 1971 as compared with the comparable months of 1970.[25]

[J.A. 543] Comparing Western's online passenger data with the single-carrier data shown for Western in the Board's traffic surveys, it appears that the Board's reported passenger data are understated.[26] Thus, the latter passenger total apparently was understated by 9.5 percent in calendar 1969, by 8.5 percent in fiscal 1970, and by 10.3 percent in the six quarters ended June 30, 1970.

Continental made an analysis of Western's reported online O&D passengers and reserved seat load factor data for the carrier's San Diego-Denver nonstop flights, for the period June 1970-May 1971, on a monthly basis. Continental's analysis shows that in June 1970 when Western inaugurated nonstop service, 43 percent of the carrier's San Diego-Denver passengers used nonstop or connecting services; and that beginning with July 1970 through May 1971,

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[24] See Appendix 3, page 2, attached hereto.

[25] The San Diego Parties point out that Western's online O&D passengers increased 24.5 percent from the 10-month period September 1969-June 1970 to the comparable period September 1970-June 1971; and that the increase from the 8-month period September 1969-April 1970 to the comparable period September 1970-April 1971 was 26.8 percent as against a decline of 2.1 percent in total U.S. domestic enplanements.

[26] See Appendix 3, page 3, attached hereto.

the percentage of Western's online passengers employing onestop or connecting services ranged from a low of 7 percent in February 1971 to a high of 36 percent in September 1970.

Air West also made an analysis of Western's reported online O&D passengers and reserved seat load factors for its nonstop flights, covering the months of August and November 1970 and February and May 1971. From this analysis, Air West concludes that the number of Western's San Diego-Denver passengers not on board the nonstop flights ranged from a low of 6.9 percent in February 1971 to a high of 30.3 percent in August 1970, with an average of 22.4 percent for the four months covered.

[J.A. 544] 4. *San Diego-Denver Service Data.* Western is the exclusive carrier operating single-plane and nonstop service in the San Diego-Denver Market.[27] The carrier's single-plane service authority dates back to 1957 when it was authorized to provide such service via a mandatory intermediate stop at Phoenix.[28] Western's nonstop service authority stems from an award in the initial phase of this proceeding which became effective on June 8, 1970.

Western inaugurated San Diego-Denver single-plane service in December 1957, on two daily round trips employing DC-6B equipment. Since then, the carrier has contin-

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[27] While United holds authority, by tacking, to provide single-plane service in the market with a stop at Los Angeles, the carrier has not operated such service for a few years. The carrier, according to the Official Airline Guide, Quick Reference Edition, for November 1971, offered daily one-carrier connecting services, three eastbound and four westbound; however, the December 1971 Quick Reference Edition indicates that United discontinued these one-carrier connecting services. As of December 1, 1971, other than Western's schedules, only two-carrier connecting services on a one-stop basis (almost exclusively via Los Angeles) were available. See Appendix 4 attached hereto.

[28] Service to Phoenix Case, 25 C.A.B. 647 (1957).

ously upgraded its service by offering an increasing number of schedules, introducing more modern equipment, and eliminating the Phoenix stop on several frequencies. Thus, the record shows that in June 1968, Western provided four daily flights each way with B-720B fan jet aircraft. Between January 1, 1969 and June 7, 1970, the carrier scheduled four daily frequencies eastbound and five westbound, using B-720B and B-737-200 equipment.[29]

[J.A. 545] On June 8, 1970, immediately upon the effective date of its certificate for nonstop operations, Western inaugurated nonstop service between San Diego and Denver. The carrier at the outset offered two daily nonstop frequencies in each direction, with B-720B and B-737-200 equipment from San Diego to Denver and with B-720B and B-727-200 aircraft in the opposite direction. In addition, there were three daily onestop schedules eastbound (two with B-737-200 aircraft and one with a B-727-200) and four onestop flights the other way (three with B-737-200's and one with a B-727-200). The B-737-200's were operated all-coach, and the other aircraft in a dual first-class/coach configuration. The evidence shows that Western operated this pattern of schedules (including equipment) a year later, in June 1971, and in July 1971; and further shows that a pattern of five eastbound frequencies and six westbound schedules was in effect as of December 1, 1971, with the nonstops in both directions employing B-720B aircraft in dual configuration.[30]

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[29] At the beginning of this period, B-720B aircraft were employed on two eastbound flights and three westbound schedules, and B-737-200 aircraft were utilized for two eastbound frequencies and two westbound services. At the close of the period, Western was conducting an all B-737-200 operation eastbound on its four daily flights; westbound, the carrier was employing B-720B equipment on two flights and B-737-200 aircraft on the other three schedules.

[30] See Appendix 5 attached hereto for a summary of Western's December 1, 1971 schedules.

As of December 1, 1971, the San Diego departure times of Western's eastbound schedules were spread between 8:10 A.M. and 3:50 P.M.; westbound, the departure time spread at Denver was from 9:20 A.M. to 8:00 P.M. Western's one-way fares were first-class $79.63 and coach $62.04. The seating capacity of Western's aircraft in San Diego-Denver service was as follows: B-737-200 (95 seats), B-727-200 (122 seats), and B-720B (120 seats).[31]

[J.A. 546] Western furnished performance factor data for its San Diego-Denver scheduled services, nonstop and onestop, by flight, by direction, and by month, for the period January 1969 through October 1971. These data show that in the period July 1970-October 1971 when nonstop service was operated, the eastbound nonstop flights 474 and 426/603 had performance factors of 100 percent in 11 months and 10 months, respectively, out of the 16 months involved; and that the westbound nonstop flights 425 and 421/543 had 100 percent performance factors in 11 and 9 months, respectively. Further, according to Western's evidence, its experienced dilution factors for the San Diego-Denver nonstop segment in March 1971 were: first-class 12.4 percent, coach 18.9 percent, and overall 18.4 percent.

In 1970 (including the pre-inaugural period), Western's advertising and sales promotion expenditures for the San Diego-Denver nonstop route amounted to $100,000. The carrier estimates that in 1971 these expenditures will increase to $127,000. Western also observes that it has prepared extensive, imaginative and effective advertising for use on local radio, television, and in many newspapers; that it is

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[31] Western's evidence indicates that in July 1971 the carrier offered a total of 1,176 seats daily on its 11 nonstop and onestop schedules in the San Diego-Denver market (eastbound, 527 seats, and westbound, 649 seats). It further appears that as of September 1971, Western had 70 aircraft in its fleet, including 25 B-720B's, 6 B-727-200's and 30 B-737-200's; and that the carrier had 3 B-727-200's on order and 3 on option.

continuously promoting the market through its various sales and public relations efforts; that it is featuring San Diego as a stopover point for those passengers traveling from Denver and the Rocky Mountain area to Hawaii; and that it is offering a new low tour basing fare from Denver to Southern California via San Diego.

Western supplied information respecting its extra-section activity over the San Diego-Denver segment. The carrier states that it operated one extra section and one charter over the segment during the first year of nonstop operations; that it was booking two extra sections to be operated during the 1971 Thanksgiving holiday; that two extra sections and three charters were scheduled for the December 12-15, 1971 weekend to accommodate a professional football game between the Denver and San Diego teams; and that additional extra sections were scheduled over the Christmas and New Year's holidays.

[J.A. 547] 5. *Western's San Diego-Denver Load Factors.* Western submitted load factor data respecting its nonstop and one-stop San Diego-Denver services, both on a total on-board basis (that is, including standby traffic) and on a reserved seat basis (that is, excluding standby traffic).[32] It appears from these data that Western's on-board load factor for its nonstop services[33] averaged 45.2 percent for the period June-December 1970 and 47.6 percent for the 12 months ended June 30, 1971, and that in the period June 1970-June 1971 the on-board load factor ranged between a low of 36.5 percent in October 1970 and a high of 55.3 percent in June 1971. During July and August 1971 the onboard load factor mounted to 60.9 percent and 66.9 percent, respectively, but declined to 52.7 percent and 45.8 percent in September and October 1971, respectively.

[32] See Appendix 6 attached hereto for details of the load factor data.

[33] See Appendix 6, page 1 attached hereto.

Western's on-board coach load factors for its nonstop services were higher than the carrier's overall load factors.[34] Thus, in the June-December 1970 period the coach load factor averaged 48.9 percent, with a low of 39.2 percent in October and a high of 58.8 percent in August; in the January-October 1971 period the coach load factor ranged between a low of 45.9 percent in May and a high of 69.6 percent in August.[35]

[J.A. 548] An analysis of the nonstop services on a flight-by-flight basis discloses substantial variations in monthly on-board coach load factors as between nonstop flights in the 17-month period June 1970-October 1971. The variations are reflected in the following table:[36]

[34] See Appendix 6, page 1 attached hereto. In contrast, the on-board first-class load factors on the nonstop flights were significantly lower than the overall load factors. In the June-December 1970 period the average first-class load factor was 17.3 percent, with a low of 14.5 percent in October and a high of 23.1 percent in December; in the January-October 1971 period, the low first-class load factor was 23.0 percent in June and the high was 35.6 percent in March and August.

[35] Throughout the June 1970-October 1971 period Western operated a pattern of nonstop flights bearing the same flight numbers, except that on January 6, 1971 the carrier discontinued flights 426 and 421 and inaugurated flights 603 and 543. When this schedule change was made, flights 426 and 421 had attained on-board coach load factors of 69.7 percent and 74.5 percent, respectively, and overall load factors of 65.7 percent and 65.5 percent, respectively.

[36] For details, see Appendix 6, page 2 attached hereto.

	Eastbound Flights		Westbound Flights	
	Flight 474	Flights 426/603	Flight 425	Flights 421/543
High monthly coach load factor	88.9% (Aug. 1971)	58.8% (Aug. 1971)	79.5% (Aug. 1971)	55.8% (Aug. 1971)
Low monthly coach load factor	51.2% (Nov. 1970)	27.1% (Jan. 1971)	55.4% (Oct. 1970)	16.4% (Oct. 1970)
No. of months:				
Under 20%	—	—	—	3
20-29%	—	2	—	5
30-39%	—	5	—	6
40-49%	—	8	—	1
50-59%	4	2	5	2
60-69%	4	—	7	—
70-79%	6	—	5	—
Over 80%	3	—	—	—

Turning to the on-board load factors on Western's onestop services in the San Diego-Denver market,[37] it appears that in calendar 1970, the San Diego-Phoenix segment had an average overall on-board load factor of 53.6 percent, with a range between a high of 64.2 percent in August and a low of 45.2 percent in April; and that the on-board coach load factor averaged 55.6 percent, with a range between a high of 66.9 percent in August and a low of 47.8 percent in April. The monthly on-board coach load factor was be- [J.A. 549] tween 40 and 49 percent twice, in the 50-59% range 7 times, and over 60 percent in 3 months. On the Phoenix-Denver sector of the onestop services, the average overall load factor in calendar 1970 was 68.9 percent, with a range between a high of 80.3 percent in August and a low of 58.9 percent in April; the on-board coach load factor averaged 70.7 percent, the high being 82.99 percent in August and the low being 60.3 percent in April. The monthly on-board coach load factor on the Phoenix-Denver sector in 1970 was between 60 and 69 percent 6 times, in the 70-79 percent range in 5 months, and over 80 percent once.

[37] See Appendix 6, page 3 attached hereto.

There were significant variations in the monthly on-board coach load factors on the onestop services as between flights. In the January-October 1971 period for which Western supplied load factor data, the carrier operated three daily eastbound flights.[38] Flight 700 had monthly coach load factors ranging between 87.2 percent (August) and 70.7 percent (January) on the San Diego-Phoenix segment, with the monthly factor being in the 70-79 percent range in 7 months and over 80 percent 3 times; on the Phoenix-Denver sector, flight 700's monthly coach load factor ranged between 96.6 percent (April) and 70.5 percent (September), with the monthly factor being in the 70-79 percent range in 4 months, between 80 and 89 percent, 4 times, and over 90 percent twice. Eastbound flight 476 had a range in its monthly coach load factor on the San Diego-Phoenix segment between 77.8 percent (September) and 49.5 percent (October), with the monthly factor being under 50 percent once, between 50 and 59 percent 4 times, in the 60-69 percent range in 4 months, and over 70 percent once; on the Phoenix-Denver sector, flight 476 achieved a high monthly coach load factor of 91.5 percent (March) and a low of 68.7 [J.A. 550] percent (May), with the coach factor being under 70 percent once, in the 70-79 percent range twice, between 80 and 89 percent 6 times, and over 90 percent in one month. The remaining eastbound flight—flight 216—had monthly on-board coach load factors on the San Diego-Phoenix segment ranging between 63.3 percent (April) and 45.2 percent (September), with the load factor being in the 40's twice, in the 50's five times, and over 60 percent in one month; on the Phoenix-Denver sector, flight 216 had a range in its monthly on-board coach load factor between 79.9 percent (April) and 63.4 percent (September), with the load factor being in the 60's 4 times and in the 70's 6 times.

[38] See Appendix 6, page 4 attached hereto.

Western operated four daily westbound flights in the January-October 1971 period.[39] Flight 215 had a monthly on-board coach load factor on the Denver-Phoenix sector ranging between 95.7 percent (February) and 69.9 percent (September), with the factor being under 70 percent once, in the 70-79 percent range twice, between 80 and 89 percent in 4 months, and over 90 percent in three months; on the Phoenix-San Diego sector, the monthly on-board coach load factor ranged between 76.2 percent (January) and 54.4 percent (October), with the factor being under 60 percent twice, in the 60-69 percent range in 2 months, and over 70 percent in 6 months. The monthly on-board coach load factor on flight 417 over the Denver-Phoenix segment ranged between 84.3 percent (February) and 71.5 percent (May), and was in the 70's 6 times and the 80's in 4 months; over the Phoenix-San Diego sector, flight 417's coach load factor had a range of 89.2 (March)—75.2 (October), and the coach load factor was in the 70's twice and the 80's in six months. Flight 479's monthly on-board coach load factor Denver-Phoenix ranged between 82.6 percent [J.A. 551] (August) and 60.7 percent (May), with the load factor being in the 60's once, in the 70-79 percent range 5 times, and the 80's in 4 months; on the Phoenix-San Diego sector, flight 479 had a monthly on-board coach load factor ranging between 81.3 percent (August) and 57.0 percent (March), and the coach load factor was in the 50's once, between 60 and 69 percent 4 times, in the 70-79 percent range in 4 months, and over 80 percent once. Flight 701 over the Denver-Phoenix sector, had a high monthly on-board coach load factor of 90.7 percent (February) and a low of 59.7 percent (September, October), with the coach load factor being in the 50's twice, the 60's 4 times, the 70's once, the 80's twice, and the 90's once; on the Phoenix-San Diego sector, flight 701 had a monthly coach load factor with a high of 53.0 percent in January and a low of 35.5 percent

[39] See Appendix 6, page 5 attached hereto.

in September, with the coach load factor being in the 30's in two months, in the 40's 7 times, and in the 50's once.

6. *Western's San Diego-Denver Capacity Data.* Western furnished data respecting the capacity flown and unused on its nonstop services.[40] Such data show that in fiscal 1971 Western offered a total of 162,213 nonstop seats, or an average of 444 seats per day. The empty seats flown on the nonstop service in fiscal 1971 averaged 233 per day (266 per day excluding standby passengers). The average number of empty seats flown, excluding the peak months of August, December, April, and June, was 247 seats per day (278 per day without standby traffic).

[J.A. 552] Western further notes that effective September 8, 1971, it increased its San Diego-Denver nonstop capacity by 25 seats daily, or 99,125 seats annually, by substituting one 120-seat B-720B aircraft for a 95-seat B-737-200 aircraft (employed on flight 474). On the other hand, as observed by Continental, subsequent schedules indicate that Western plans to change the equipment on flight 474 back to a B-737-200 on December 15, 1971 and thus will eliminate the previously added nonstop seat capacity.

In addition, Western points out that its two daily nonstop round trips are supplemented by its daily onestop flights via Phoenix, three eastbound and four westbound. The carrier asserts that through a combination of the nonstop and onestop flights there is an abundance of capacity in the market.

Western's San Diego-Denver Service Plans

Western states that while the use of equipment may vary from time to time due to routing and equipment maintenance requirements, it intends to continue serving the nonstop market with B-720B and B-727-200 aircraft. According to the carrier, these aircraft are better suited for the stage

[40] See Appendix 7 attached hereto.

length involved than Western's B-737-200 aircraft which it asserts are designed to serve shorter-haul markets. Further, Western observes that the B-737-200 aircraft lacks the capacity of the B-720B and the B-727-200. However, testimony of Western's witness as to the equipment to be operated in 1972 expressly indicates that the equipment plans has not been firmed up.

Western additionally states that it plans to introduce a third daily nonstop round trip in the San Diego-Denver market some time before the summer of 1972, adding that the nonstop services will continue to be supplemented by numer- [J.A. 553] ous onestop frequencies via Phoenix. The carrier comments that the introduction of the third nonstop round trip (two daily flights at 120 seats per flight) will add a total of 87,600 seats annually in the market, so that, for a time, demand should be exceeded by a comfortable margin. However, Western's witnesses were unable to give any indication as to the routing of the future schedules and stated that none of the carrier's 1972 schedules had been finalized.

With respect to extra-section activity, Western expects an increase in business of this nature as the market continues to develop. The carrier states that it plans to operate extra section flights to San Diego in August 1972 in connection with the Republican National Convention, and anticipates that other peak periods such as Easter and heavy summer weekend traffic will require additional extra sections.

Proposals of the Carrier-Applicants

Four carriers—Air West, Continental, TWA, and United—submitted proposals to serve the San Diego-Denver nonstop market in competition with Western. A summary of the proposed service of each carrier, together with its forecasts of traffic and financial results, follows.

1. *Air West*, which has a station at San Diego, proposes to establish a new station at Denver,[41] and to operate two nonstop round trips between San Diego and Denver. One round trip, which would be operated daily, would consist of a midday departure originating at San Diego and proceeding [J.A. 554] to Denver, and an early evening departure from Denver to San Diego which would continue on to Santa Ana,[42] 76 miles from San Diego. The second round trip would be operated six days a week, daily except Saturday eastbound and except Sunday westbound; this round trip would consist of a schedule originating at Santa Ana, departing San Diego in the evening for Denver, and leaving Denver in the morning for San Diego.[43] The San Diego-Santa Ana portions of the two round trips would operate over Air West's existing system, and the San Diego-Denver portions would be new flight mileage. The proposed services would be provided with DC-9-30 aircraft, 98 seats, in standard class configuration, with 3-and-2 abreast seating.[44] The carrier proposes to offer an "S" class fare equal to the San Diego-Denver coach fare of $62.04 and to commonrate the San Diego-Denver and Santa Ana-Denver markets. According to the carrier, it will operate the same pattern of service in 1973 as in 1972.

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[41] Air West does not expect that it will acquire any new ground equipment at Denver because it will probably contract with another carrier to conduct Air West's ground servicing operations at Denver.

[42] The aircraft flown on these schedules would turn around at Denver.

[43] Apparently, the aircraft employed on these schedules would overnight at Denver.

[44] Air West states that the additional aircraft hours required by the proposed San Diego-Denver flights involve less than one aircraft, and anticipates that no additional aircraft will be required. However, if such is not the case, the carrier states that it will acquire the necessary aircraft through either purchase or lease.

Air West forecasts that the San Diego-Denver market will amount to 120,637 passengers in 1972 and 132,701 in 1973. The base of Air West's forecast is Western's reported online O&D passengers in fiscal year 1971—81,969 passengers. Estimating the ratio of Western's online O&D passengers to total online O&D passengers at 95 percent and again estimating the ratio of total online O&D passengers to true O&D and connecting passengers at 95 percent, Air West constructs a fiscal year 1971 total of 90,824 true [J.A. 555] O&D and connecting passengers. Applying a 10 percent per year growth factor [45] and a 15 percent stimulation factor for first competitive nonstop service,[46] Air West predicts a total 1972 market of 120,637 passengers after its entry and a total 1973 market of 132,701 passengers.

Air West further estimates that it will carry 46,415 San Diego-Denver passengers in 1972 and 51,057 in 1973. These estimates are derived as follows: First, the carrier forecasts that of the total market after Air West's entry, 95 percent will be single-carrier passengers on the services of Air West and Western (114,605 in 1972 and 126,066 in 1973), and that 90 percent of the single-carrier passengers will be nonstop passengers (103,145 in 1972 and 113,459 in 1973).[47] Then, Air West estimates its participation in

[45] Air West claims that this growth rate is conservative, taking into account the historic growth of San Diego-Denver traffic in the 1964-1969 period, the strong growth of San Diego and Denver traffic during a period when the industry as a whole has remained relatively static, and the strong growth trend in Western's San Diego-Denver traffic even when full allowance is made for stimulation due to inauguration of nonstop service. Air West asserts that if the New Economic Program is successful, the actual growth rate should be substantially greater than 10 percent.

[46] This is based upon the Bureau's Q.S.I. traffic forecasting technique and Air West's addition to the market of two nonstop round trips operated with jet aircraft.

[47] Air West states that this makes allowance for the fact that United will continue to carry some online traffic between San Diego and Denver and that some traffic will move via two-carrier connecting services for reasons of its own.

the nonstop traffic at 45 percent [48] to obtain its estimates of 46,415 passengers in 1972 and 51,057 in 1973.

[J.A. 556] In addition, Air West expects to carry 8,448 Santa Ana-Denver passengers in 1972 and 8,870 such passengers in 1973. Total Air West passengers under its service proposal would therefore amount to 54,863 in 1972, and 59,927 in 1973. The carrier predicts a passenger load factor of 42.1 percent in 1972 and 46.0 percent in 1973.

Air West's net passenger revenues (after dilution at 15 percent) are es imated at $2,892,926 in 1972 and $3,159,951 in 1973. Including non-passenger revenues at 5.5 percent of passenger revenues (based upon Air West's experience for the year ended March 31, 197 modified to exclude charter revenues), the carrier expects to realize total revenues of $3,052,037 in 1973 and $3,333,748 in 1973 under its service proposal.

The local service carrier submitted two estimates of its expenses in connection with the proposed services, one employing standard Subpart K costing and the second using a modified Subpart K technique involving Air West's "Subpart K" unit costs for direct operating expenses and local service industry average costs for indirect (servicing) expenses. This produces the following financial results for the carrier's service proposal:

[48] Air West observes that its ultimate participation factor is approximately 39 percent of the *total* San Diego-Denver market before allowance for passengers who would not use single-carrier service and single-carrier passengers who would not move on nonstop services.

Item	Standard Subpart K Method		Modified Subpart K Method	
	1972	1973	1972	1973
Total revenues	$3,052,037	$3,333,748	$3,052,037	$3,333,748
Direct expenses	1,189,988	1,189,988	1,189,988	1,189,988
Indirect expenses	1,397,453	1,506,686	1,131,478	1,219,994
Total expenses	2,587,441	2,696,674	2,321,466	2,409,982
Operating profit	464,596	637,074	730,571	923,766
Return and tax	557,336	557,336	557,336	557,336
Subsidy reduction	($92,740)	$79,738	$173,235	$366,430

[J.A. 557] Thus, Air West estimates that it will obtain an operating profit in 1972 and 1973 under either costing technique; that it will suffer a subsidy increase of $92,740 in 1972 and achieve a subsidy reduction of $79,738 in 1973 under standard Subpart K; and that it will produce subsidy reductions in both forecast years under the modified costing techniques ($173,235 in 1972 and $336,430 in 1973).

In preparing its estimates of financial results, Air West made no specific allowance for cost inflation. It omitted doing so, the carrier states, because (1) Air West's unit costs have been going down rather than up, and the San Diego-Denver route, representing a significantly longer length of hop and length of haul than Air West's historic system average, would produce significantly lower unit costs, (2) Air West assumed that any future wage and price increases which can not be offset by technological improvements or productivity increases will be offset by increases in fares, and (3) the Nixon Administration has taken dramatic action to curb inflation.

Under its financial forecast for 1972, Air West calculates that under the standard Subpart K costing method it would have to carry 40,879 passengers to break even and would have a breakeven passenger load factor of 31.4 percent. Under the modified Subpart K technique favored by Air

West, the breakeven number of passengers would be 35,483 and the breakeven passenger load factor 27.2 percent, according to the carrier. Air West's estimate of preoperating expenses for its San Diego-Denver route proposal shows a total of $990,000, including $75,000 for advertising and sales promotion and $15,000 for route proving flights.

[J.A. 558] Air West states that it will not suffer any self-diversion under an award to it of competitive nonstop authority. Recognizing that in 1969 it participated in the carriage of 250 true O&D Denver-San Diego passengers and 550 true O&D Denver-Santa Ana passengers for part of their trip, Air West submits that even if it is granted a nonstop award, these passengers would continue to move via similar indirect routings in the future.

Air West furnished two estimates of diversion from Western resulting from the award of competitive nonstop authority to the local service carrier. Based upon Western's 1969 online O&D passenger total and using Air West's passenger forecasting method, Air West indicates that in 1972 Western would carry 68,190 passengers in competition with Air West, exceeding Western's 1969 total of 60,688 passengers and would therefore suffer no passenger loss. Based upon Western's fiscal year 1971 total of 81,969 online O&D passengers and using Air West's forecasting technique, Air West indicates that in 1972 Western in competition with Air West would carry 68,190 passengers and would therefore suffer a loss of 13,779 passengers amounting to a loss of $735,842 in net passenger revenues.

2. *Continental*, which has a station at Denver, would have to establish a station at San Diego. Under its San Diego-Denver proposal, the carrier proposes an initial pattern of two daily nonstop round trips in the market [49] which

[49] Continental states that as the economy recovers and traffic growth returns to a more normal rate, it would increase its flight frequency, and indicates that with a return to a healthy economy,

[J.A. 559] would be operated San Diego-Denver-Kansas City eastbound and Kansas City-Denver-San Diego westbound. In an eastbound direction Continental would offer a noon [50] and an early evening (5:15 p.m.) departure [51] from San Diego; westbound, the flights from Kansas City would depart Denver at 9:15 a.m.[52] and 3:00 p.m.[53] The San Diego-Denver portion of the four flights would be extensions of existing Denver-Kansas City schedules.

All of Continental's San Diego-Denver schedules would be operated with 110-seat B-727-200 equipment [54] offering three classes of services and three-and-two seating in the coach and economy classes.[55] The total capital requirement

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the third frequency should be economically practicable by at least mid-1973, although no decision has been made as to exactly when the third round trip would be instituted. However, the carrier mentions that the third frequency would probably be added when the load factor on its operations was in the 55-70 percent range, and adds that, in all probability, the third frequency would be a San Diego-Denver-Kansas City service.

[50] This schedule would offer connections at Denver for Oklahoma City, Wichita, Tulsa, and Colorado Springs.

[51] Connections would be offered at Denver for Colorado Springs.

[52] With connections at Denver from Colorado Springs, Tulsa, Wichita, and Oklahoma City.

[53] There would be connections at Denver for Colorado Springs, Tulsa, and Wichita.

[54] Continental also presented a proposal involving the substitution of a larger B-707 aircraft during peak summer months (June, July, August) which it claims would relieve high load factor flights and yield an operating profit of $2,559,000 in 1973 as compared to a profit of $2,964,000 with an all-B-727-200 operation.

[55] Continental has on hand, as of September 1, 1971, a total of 60 aircraft, including 19 B-727-200's. Eight DC-10's are on order, deliveries to start in 1972, and eight such aircraft are on option, which has not yet been exercised. Continental states that it will have aircraft on hand in 1972 available for use under its proposed schedules, especially after delivery of the DC-10's starts, and will not have to purchase aircraft for the proposed services.

for Continental's proposal is estimated at $7,438,000,[56] including flight equipment at $6,323,000,[57] and ground equipment at $331,000. Also included is $700,000 for pre-operating expenses ($150,000 for training and $550,000 for advertising and promotion).

[J.A. 560] Continental's basic fares would be $79.63 and $62.04 for first-class and coach service, respectively, in the San Diego-Denver market, and $54.63 for economy class service.[58] The carrier also proposes to introduce or match various promotional fares in the market,[59] including a round trip tour basing fare at 70 percent of the basic coach fare; and would bring to the market the benefits of its Director of Passenger Services program.

Continental forecasts that the 1972 San Diego-Denver market, after growth and stimulation, will amount to 103,932 passengers, and the 1973 market to 111,727 passengers. The carrier uses as the base traffic for its forecasts the true O&D and connecting passengers in the market in fiscal year 1970 as shown in the Board's surveys, amount-

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[56] Continental indicates that it would obtain any necessary funds for capital requirements from debt financing, equity financing, or internal operations, depending upon the conditions prevailing at the time such funds are required.

[57] While its capital requirements contemplate one additional B-727-200 aircraft, Continental states that, for the forecast year, it has the necessary flight time from its existing fleet.

[58] Continental notes that through adjustments to the fare structure arising from various Board-approved fare increases, the economy fare is presently set at 90 percent of the coach fare. The carrier states that it is its position and intent that the economy fare be set at 85 percent of the coach fare, and that it is supporting this proposal in Phase 9 of the Domestic Passenger Fare Investigation, Docket 21866-9.

[59] Continental indicates that some of the promotional fares would not be available under the initial schedule proposal, but would be made available as soon as schedules are introduced which permit their use.

ing to 65,120 passengers (50,840 true O&D and 14,280 unduplicated connecting passengers).[60] This total is expanded to a 1972 level by using a 7.5 percent annual growth rate,[61] [J.A. 561] and employing a 33 percent stimulation factor for first nonstop service by Western and first competitive nonstop service by Continental.[62] To reach a 1973 forecast total of 111,727 San Diego-Denver passengers, Continental applies a 7.5 percent annual growth factor to the estimated 1972 total of 103,932 passengers.

Continental further forecasts that it will carry 40 percent of the San Diego-Denver traffic in 1972 (41,573 passengers) and 45 percent in 1973 (50,277 passengers), with Western's share amounting to 50 percent in 1972 and 45 percent in 1973 and 10 percent of the market moving over services other than nonstops in each year.[63] Continental bases the 40:50 split in 1972 on Western's advantages of existing identity in the market and its existing onestop

[60] Continental states that while analysis of the Board's O&D survey data shows an understatement of about 10 percent as compared to Western's actual experience, it has made no upward adjustment to compensate for this understatement. Continental further states that it has made no upward adjustment in its base to account for the San Diego-Denver traffic moving over the Los Angeles gateway which travels via PSA over the San Diego-Los Angeles leg and does not show up in the Board's surveys.

[61] Continental notes that this is the San Diego-Denver O&D passenger growth rate for fiscal years 1969 and 1970, both recession periods, as shown by the Board's traffic surveys. The carrier states that it employed this growth rate in order to present a conservative forecast, and that it has no doubt that the market will resume its strong growth pattern when the national economy fully recovers.

[62] Continental bases the use of a 33 percent stimulation factor on the Board's Order 71-3-135 (Appendix A), dated March 23, 1971. The same stimulation factor is employed in Order 71-4-112 (Appendix A), dated April 16, 1971.

[63] Continental cites Order 71-3-135 (Appendix A) as the basis for the 10 percent factor.

authority via Phoenix. Continental believes that by 1973 its promotional efforts will enable it to achieve an even split of the nonstop traffic.

In addition to San Diego-Denver passengers, Continental estimates that it will carry beyond-passengers in 1972 and 1973 in various markets, as shown in the following table:

Between San Diego and:	1972	1973
Colorado Springs	3,856	4,144
Kansas City	36,578	38,919
Oklahoma City	4,104	4,410
Tulsa	2,818	3,030
Wichita	6,631	7,128
Total	53,987	57,733

[J.A. 562] Overall, Continental expects to carry, under its service proposal, 95,560 passengers in 1972 and 108,010 passengers in 1973.

Continental estimates its net passenger revenues at $6,297,000 in 1972 and $7,030,000 in 1973 after allowing for dilution at 16 percent.[64] With cargo revenues estimated at 7 percent of net passenger revenues, Continental expects to realize total operating revenues of $6,738,000 in 1972 and $7,525,000 in 1973.

Continental submitted estimates of the operating results of its service proposal for 1972 and 1973. The carrier

[64] This represents Continental's experienced dilution for the 12 months ended March 31, 1971. The carrier states that dilution will be less than this experienced factor due to the decrease in promotional fare discount rates and coverage introduced earlier in 1971, but that this decrease should be offset by the increased use of economy fare service.

expects to obtain an operating profit of $7,835,000 in 1972 and $2,964,000 in 1973, as summarized in the following table:

Item	1972	1973
Total revenues	$6,738,000	$7,525,000
Direct expenses	1,940,000	2,029,000
Indirect expenses	2,963,000	2,532,000
Total expenses	4,903,000	4,561,000
Operating profit	1,835,000	2,964,000

According to Continental, expenses are based on the carrier's actual experience. It further states that it has used escalation factors based on actual labor contracts now in existence and on experienced escalation in other expense [J.A. 563] items.[65] Continental plans to spend 5 percent of its estimated passenger revenues for advertising and promotion of the San Diego-Denver market; this amounts to $315,000 in 1972 and $352,000 in 1973.[66]

Continental has calculated self-diversion for 1972 and 1973 under its service proposal.[67] However, the carrier did not exclude self-diversion from its profit and loss statement. On the contrary, it showed the total revenues available to support its San Diego-Denver proposal, basing its

[65] Continental estimates its average annual cost escalation factor to 1973 at 5.8 percent.

[66] Continental states that it has allocated an initial promotional budget of $300,000 at San Diego, $100,000 at Denver, and $25,000-$50,000 for each beyond city to promote the inauguration of the new services. After the initial program, tied to inauguration of service, Continental plans to continue strong promotional efforts in all the markets.

[67] Self-diversion is estimated at 19,463,000 R.P.M.'s in 1972 and 20,777,000 R.P.M.'s in 1973. No computation of self-diversion in terms of passengers and passenger revenues was submitted.

decision to do so on Appendix A to Orders 71-3-135 and 71-4-112.

Continental submitted an estimate of diversion from Western and other carriers in 1972 under its service proposal. Starting with its estimate of the number of passengers it expects to carry in the San Diego-Denver and beyond markets in 1972, Continental offsets the number of passengers that the nonstop services of both Western and Continental would generate, in order to arrive at the number of diverted passengers. Continental then allocates diversion on the basis of fiscal year 1970 participation.[68] On this basis, Continental submits that no carrier would be seriously affected by Continental's certification.[69]

[J.A. 564] 3. *TWA* has a station at Denver, but not at San Diego, and would therefore have to establish a new station at the California city if granted a San Diego-Denver nonstop award. Under its service proposal, TWA in 1972 would offer two daily round trips between San Diego and Denver with B-727-100 equipment in a seating configuration of 24 first-class and 69 coach seats. In an eastbound direction the carrier would provide a morning (9:15 a.m.) and a

[68] Continental proceeds on the theory that this is not a new route case, but a remanded phase of an earlier proceeding designed to examine the need for nonstop competition in the San Diego-Denver market; that had two nonstop carriers been authorized originally, diversion from Western would have been based on the traffic it then carried on its onestop services reduced by growth offset; and that the remand of the issue of a second nonstop carrier does not mean that Western is entitled to take credit for traffic gained from its nonstop services in the interim between June 1970 and the forecast year.

[69] Continental's estimate of diversion is expressed in terms of revenue passenger miles. According to Continental, carriers principally affected by an award to Continental would be Western (San Diego-Denver market), United (San Diego-Denver market), TWA (San Diego-Oklahoma City), and American (San Diego-Oklahoma City and San Diego-Tulsa). Diversion would occur only in the San Diego-Denver/Oklahoma City/Tulsa markets.

midday (12:15 p.m.) departure from San Diego; westbound, there would be a mid-morning (10:15 a.m.) and evening (7:50 p.m.) departure from Denver. The routings would be as follows:[70]

Eastbound:

San Diego-Denver-St. Louis-Cincinnati-Philadelphia
San Diego-Denver-St. Louis-Cleveland

Westbound:

Cincinnati-St. Louis-Denver-San Diego
Philadelphia-St. Louis-Denver-San Diego

The San Diego-Denver portions of the flights would be new mileage, and the carrier proposes to make adjustments in its present eastbound and westbound schedules in order to operate the proposed services. San Diego-Denver one-way fares would be $79.63 first-class and $62.04 coach class, as at the present time.

[J.A. 565] TWA estimates that in 1972 the San Diego-Denver market, after growth and stimulation, will total 96,830 passengers. Under its forecasting technique, TWA employs as a base fiscal year 1970 passenger data from the Board's traffic surveys, showing 70,430 O&D, and connecting passengers. TWA then expands this total for growth (zero growth from fiscal 1970 to calendar 1971, and 10 percent growth 1971-1972) and stimulation (at 15 percent) for

[70] Online connections would also be available at Denver and St. Louis to such points as Indianapolis, Dayton, Cleveland, Louisville, New York, Hartford, Washington, D.C., Atlanta, and Pittsburgh. In addition, there would be an opportunity for single-carrier service between San Diego and Europe via Denver, since TWA currently provides Denver with single-plane service to Paris and Rome with connecting service to London. According to TWA, as traffic develops and TWA's service increases, the opportunities for improved San Diego transatlantic service will be expanded.

institution of first nonstop service by Western, yielding a total of 88,030 San Diego-Denver passengers, before nonstop competition. With stimulation at 10 percent for TWA's nonstop services, the carrier arrives at a 1972 total market of 96,830 passengers in 1972. Employing a 15 percent growth factor 1972-1973, TWA predicts a total 1973 market of 111,355 passengers.

TWA further estimates that the 96,830 passenger total for 1972 will break down as follows: TWA 40 percent (38,730 passengers), Western 55 percent (53,260 passengers) and other 5 percent (4,840 passengers). TWA anticipates that it will also carry 18,130 San Diego-St. Louis passengers and 5,310 San Diego-Cincinnati passegers in 1972, for an overall total of 62,170 passengers.[71] For 1973, the carrier predicts that it will carry 71,500 passengers,[72] consisting of 44,540 San Diego-Denver, 20,850 San Diego-St. Louis, and 6,110 San Diego-Cincinnati passegers.

[J.A. 566] TWA's estimate of passenger revenues in 1972 shows a total of $4,561,776, composed of $3,304,412 from the new route and $1,257,364 from Denver-East passengers. For 1973, the carrier estimates its passenger revenues at $5,246,548, consisting of $3,800,342 for San Diego-Denver/St. Louis/Cincinnati passengers and $1,446,206 for Denver-East passengers. Total revenues are forecast at $4,789,865 in 1972 and $5,508,875 in 1973.[73]

TWA estimates that the San Diego-Denver route will result in a system profit of $123,859 in 1972 and $764,490

[71] The carrier estimates that this total will consist of 12,430 first-class and 49,740 coach passengers.

[72] The carrier estimates that this total will consist of 14,300 first-class and 57,200 coach passengers.

[73] Mail revenues are computed at 1.9 percent of passenger revenues, and cargo revenues at 3.1 percent of passenger revenues, based upon TWA's domestic experience for combination aircraft for the year ended March 31, 1971.

in 1973 after taking net self-diversion into account, as reflected in the following table:[74]

Item	1972 New Route	1972 Denver-East	1972 Total	1973 New Route	1973 Denver-East	1973 Total
Revenues	$3,469,633	$1,320,232	$4,789,865	$3,990,359	$1,518,516	$5,508,875
Expenses	4,048,546	248,589	4,297,135	4,037,710	285,923	4,323,633
Operating profit (or loss)	(578,913)	1,071,643	492,730	(47,351)	1,232,593	1,185,242
Net self-diversion		365,871	365,871		420,752	420,752
System profit (or loss)	$ (578,913)	$ 705,772	$ 126,859	$ (47,351)	$ 811,841	$ 764,490

[J.A. 567] TWA points out that the new route, by itself, would show an operating loss in each of the forecast years, and that it is only after the operating results of Denver-East traffic are taken into account that there would be an overall, but modestly profitable result.

The estimate made by TWA of the capital and promotional requirements of the San Diego-Denver route amounts to $540,000. This consists of $400,000 for advertising and promotion, and $140,000 for station provisioning-capital items and for terminal facilities. TWA indicates that no

[74] TWA's unit costs and ratio of direct expense to indirect expense reflect the carrier's experience for the year ended March 31, 1971. In addition, the carrier applied to the estimates of expenses (excluding depreciation) for 1972 and 1973 an expense escalation factor of 5 percent, based upon a 4.7 percent increase in TWA's B-727-100 direct costs for the first six months of 1971 over the prior period; for 1972, it estimates expense escalation at $187,361, and for 1973, at $188,668. TWA's estimate of 1972 net self-diversion represents the revenues of St. Louis and Cincinnati passengers to Los Angeles, less related expense; for 1973, the carrier adds 15 percent for 1972-1973 growth.

capital outlay will be required for the additional B-727-100 aircraft required by its service proposal.

The passenger load factor predicted by TWA for the new route is 45.7 percent in 1972 (first-class 35.4 percent and coach 49.2 percent) and 52.7 percent in 1973 (first-class 40.8 percent and coach 56.8 percent). The breakeven passenger load factor is forecast at 53.1 percent and 53.2 percent in 1972 and 1973, respectively.

TWA made an estimate of diversion from other carriers in 1972. The carrier forecasts diversion of 2,597 San Diego-Denver passengers and $1,445,874 in passenger revenues from Western and total diversion of 3,993 passengers and $1,668,984 in passenger revenues in the San Diego-Denver market. Diversion from American in the San Diego-St. Louis/Cincinnati markets is estimated at 1,239 passengers and $1,353,498 in passenger revenues. Gross revenue diversion for all markets embraced by TWA's proposal comes to $3,123,447 and net diversion (after subtracting related expenses) to $2,562,922.

[J.A. 568] 4. *United*, having stations at San Diego and Denver, would not be obliged to establish a new station if awarded a San Diego-Denver nonstop route.[75] Under its service proposal, United would operate two daily round trips between San Diego and Denver, including, eastbound, San Diego departures in the morning (8:30 a.m.) and mid-afternoon (2:30 p.m.), and westbound, Denver departures at mid-morning (10:00 a.m.) and evening (7:00 p.m.) The schedults would be routed as follows:

[75] United makes the point that it could operate its proposed service with little or no increase in ground equipment and personnel and with an enhanced utilization of existing equipment and productivity of its existing complement of personnel. United, as of December 31, 1970, had 187 employees in San Diego and 2,945 in Denver; its 1970 payroll was $1,806,000 at San Diego and $39,980,000 at Denver.

Eastbound:

San Diego-Denver-Omaha [76]
San Diego-Denver-Milwaukee [77]

Westbound:

Milwaukee-Denver-San Diego [78]
Omaha-Denver-San Diego [79]

In addition to the proposed nonstop services San Diego-Denver and the proposed single-plane and single-carrier connecting services San Diego-beyond Denver points, United observes that the Denver gateway would serve as an [J.A. 569] online connecting point for such other cities as Boston, Chicago, Cleveland, Detroit, Kansas City,[80] New York, Philadelphia, Rochester, Washington, D.C., and Baltimore.

United's proposed schedule pattern would be operated with 98-seat B-727-100 aircraft in dual configuration having 20 first-class and 78 coach seats.[81] The carrier would offer

[76] This flight would offer single-carrier connecting services at Denver for Milwaukee, Des Moines, and Moline.

[77] This flight would offer single-carrier connecting services at Denver for Lincoln, Des Moines, Omaha, and Cedar Rapids.

[78] This flight would offer single-carrier connecting services at Denver for San Diego passengers from Lincoln, Cedar Rapids, and Omaha.

[79] This flight would offer single-carrier connecting services at Denver for San Diego passengers from Moline, Des Moines, and Milwaukee.

[80] United comments that it is certificated to serve both San Diego and Kansas City, but is prohibited from serving both cities on the same flight; and that it would possess certificate authority to provide single-carrier service between San Diego and Kansas City via Denver if awarded the San Diego-Denver nonstop route.

[81] United estimates that one B-727-100 aircraft would be required for its service proposal. As of July 31, 1971, the carrier had on hand a total of 378 aircraft, including 86 B-727-100's, and an additional 23 aircraft were on order for delivery in 1971, 1972, and 1973. The carrier's nonstop proposal would involve a total aircraft and ground investment of $6,094,741, including an aircraft investment of $4,975,299.

one-way first-class fares of $79.63 ($86 after tax) and coach fares of $62.04 ($67 after tax) in the San Diego-Denver market, as are presently offered; in addition, it would make available various promotional fares, including an individual inclusive tour basing fare and a nonaffinity group fare for groups of 25 or more passengers. Pre-operating expense for United's proposal is estimated at $42,000 (advertising $38,000 and sales and sales promotion $4,000).

United stresses that its continuing promotion of Denver over the years is well known, and that it conducts extensive advertising of San Diego as a destination area. The carrier states that the inauguration of San Diego-Chicago/Washington, D.C./New York service pursuant to its award in the original phase of this case was accompanied by highly intensified destination advertising of San Diego, and that United's 1971 TV and newspaper advertising expenditures in Chicago, New York, Washington, D.C., and Honolulu selling San Diego as a destination amounted to $230,000 as compared to a 1970 total of $100,000.

[J.A. 570] United forecasts that the San Diego-Denver market, after growth and stimulation, will amount to 97,041 passengers in 1972 and 101,893 passengers in 1973. In making its forecast United builds upon a base representing Western's online O&D passengers during the year ended June 30, 1971, totalling 81,969 passengers. The carrier expands this total to 1972 (and 1973) at an annual growth rate of 5 percent, yielding 88,219 passengers in 1972, and then applies a stimulation factor of 10 percent for first competitive nonstop service to arrive at a total 1972 market of 97,041 passengers.

United predicts that, of this total, 90 percent or 87,337 passengers will travel on the nonstop services, and that

United will carry 45 percent of the nonstop passengers, or 39,302 passengers,[52] with Western carrying the remaining 55 percent or 48,035 passengers.[53] In addition, United expects to obtain 19,651 online passengers coming, for the most part, from Milwaukee, Omaha, Lincoln, Des Moines, Cedar Rapids, and Moline as well as other points east of Chicago. On this basis, United forecasts its overall 1972 passenger total at 58,953 passengers and 1973 total at 61,901 passengers.

United computes its passenger revenues (after dilution and allocating passengers 15 percent first-class and 85 percent coach) at $3,137,479 in 1972 and $3,294,371 in 1973. Adding mail, express, and freight revenues (on the basis of its 1970 cargo yields for scheduled passenger aircraft), the carrier predicts its total revenues in 1972 at $3,299,141 and in 1973 at $3,464,388 under its service proposal.

[J.A. 571] United's estimates of financial results for its proposal shows that it expects to incur an operating loss of $225,455 in 1972 and of $248,273 in 1973. These estimates include an allowance for escalating costs at 4.2 percent per annum [54] as applied to the carrier's historic costs for calendar year 1970; the escalation allowance amounts to $259,044 for 1972 and $404,778 for 1973. On the other hand, United's estimates do not make allowance for self-diversion, on the asserted basis that the service proposal is costed on a fully-allocated basis, with both full costs and full revenues assigned to the San Diego-Denver segment.

United calculates that under its service proposal it would have a passenger load factor of 42 percent in 1972 (first-

[52] Similarly, for 1973, United estimates nonstop passengers at 91,704 (90 percent of the total market of 101,893 passengers), with its share at 41,267 passengers.

[53] In 1973, Western's share would also be 55 percent, or 50,437 nonstop passengers.

[54] This factor is derived from United's exhibits in Phase 7 of the Domestic Passenger Fare Investigation, Docket 21866-7.

class 31 percent and coach 45 percent) and that in 1973 the passenger load factor would be 44 percent (first-class 32 percent and coach 47 percent). The carrier additionally estimates that it would divert total revenues of $1,651,985 from Western in 1972 and $1,734,585 in 1973. Passenger diversion from Western is computed at 30,480 passengers in 1972 [55] and at 32,004 in 1973.[56]

[J.A. 572] *Western's Passenger Forecast and Estimates of Operating Results and Diversion*

Western forecasts that in 1972, after growth and stimulation, the San Diego-Denver market will total 101,800 passengers. Western uses as a base its fiscal year 1971 total of 81,969 online O&D passengers, increases this total to calendar 1971 by a 5 percent growth factor based upon its 1969-1971 experience, and further expands the total to calendar 1972 by a 7.5 percent growth factor, producing a 1972 total of 92,500 passengers before stimulation for competition.[57] The carrier then applies a stimulation factor of 10 percent for competitive nonstop service, stating that the stimulative effects of its own nonstop service are already

[55] United projects that Western's online O&D passengers in 1972, with no change in route authority in this remanded case, would total 88,219 passengers; that its pasengers after a route award to United would total 57,739 passengers (including 48,035 nonstop passengers and 9,704 other pasengers); and that Western would suffer a loss of the difference, or 30,480 passengers.

[56] United estimates that in 1973 Western with no change in authority in this case would carry 92,630 online O&D passengers, representing a growth of 5 percent over 1972; that with the grant of United's application Western would carry 60,626 passengers (50,437 nonstop passengers and 10,189 other passengers); and that Western would incur a loss of 32,004 passengers, representing the difference between 92,630 and 60,626.

[57] On brief, Western indicates that it applied an average annual growth factor of 6.75 percent, to reach the 1972 forecast year.

included in the base year traffic total."[88] In this method, Western arrives at its 1972 total of 101,800 O&D and connecting passengers.

Western further estimates that 90 percent of the total market, or 91,620 passengers, would move on nonstop services, and that the remaining 10 percent would travel on the carrier's onestop services. In the event of an award to Air West, Western expects to carry 61,100 passengers (or 60 percent of the total market), consisting of 50 percent on the nonstops and 10 percent on the onestops; Air West would obtain a 40 percent share of the total market, or 40,700 passengers. According to Western, it would suffer diversion of 31,400 passengers (the difference between the 92,500 passengers Western would carry in 1972 before Air West's competition and the 61,100 passengers Western would carry after competition from Air West), which would amount to a loss of $1,716,073 in total revenues.

[J.A. 573] Additionally, assuming certification of Air West and the operation of two daily nonstop round trips by each carrier, Western predicts that Western's San Diego-Denver nonstop operations in 1972 would produce a net loss of $560,609.[89] Western projects that it would carry 70,500 passengers (50,900 San Diego-Denver nonstop passengers[90] and 19,600 beyond passengers), earn total operating revenues of $3,852,670 (after dilution at 18 percent), incur expenses of $4,332,279 and suffer an operating loss of $479,609; an adjustment of $81,000 for nonoperating revenue and expense increases the loss to $560,609.[91]

[88] On brief, Western explains that it in effect applied a 30-35 percent stimulation factor; that the stimulative effects of its first nonstop service, estimated at 20-25 percent, are included in Western's base year traffic; and that an additional 10 percent is allowed for first competitive nonstop service.

[89] The net loss in 1973 is estimated at $523,410, based upon operating revenues of $4,237,927 (at 10 percent above those for 1972), operating expenses of $4,686,347, an operating loss of $448,410, and an adjustment of $75,000 for nonoperating revenues and expenses.

[90] This represents 50 percent of the total market of 101,800 passengers.

In the event of an award to Continental, Western anticipates that it would carry 56,000 San Diego-Denver passengers (or 55 percent of the total market of 101,800 passengers), consisting of 45,800 nonstop passengers (50 percent of the total of 91,600 nonstop passengers) and 10,200 onestop passengers (10 percent of the total market); Continental is expected to carry 45,800 passengers on its nonstop services (50 percent of the total of 91,600 nonstop passengers). According to Western, it would suffer diversion of 36,500 passengers, representing the difference between the 92,500 passengers it would carry in 1972 before Continental's competition and the 56,000 passengers who would travel on Western after competition by Continental; Western estimates that the loss of 36,500 passengers would mean a loss of $1,994,798 in total revenues.[92]

[J.A. 574] Moreover, with Continental certificated for San Diego-Denver nonstop service, and each carrier operating two daily nonstop round trips, Western forecasts that in 1972 Western's San Diego-Denver nonstop operations would suffer a net loss of $838,704.[93] Western projects that it would carry 64,900 passengers (45,800 San Diego-Denver

[91] Western assumes it would operate a pattern of one B-727-200 flight and three B-720B flights daily, which was the pattern operated at the time the exhibits were submitted.

[92] Western states that TWA or United would cause revenue diversion of approximately the same amount in 1972. Western estimates revenue diversion in 1973 at the 1972 level plus 10 percent.

[93] Western estimates the net loss in 1973 at $839,274, based upon operating revenues of $3,863,490 (at 10 percent over those for 1972), operating expenses of $4,627,764, an operating loss of $764,274, and an adjustment of $75,000 for nonoperating revenues and expenses.

nonstop passengers [94] and 19,100 beyond passengers), earn total operating revenues of $3,512,264 (after dilution at 18 percent), incur expenses of $4,269,968, and have an operating loss of $757,704, which, after adjustment for nonoperating revenues and expenses at $81,000, yields a net loss of $838,704.[95]

Western also calculated revenue diversion under the "growth offset" methodology. Using calendar 1969 as the base traffic year, Western estimates it would suffer diversion in 1972 of 10,960 San Diego-Denver passengers and $613,804 in total revenues. The diverted passengers represent the difference between Western's 66,950 online O&D passengers in calendar 1969 (normalized to account for a strike) and 55,990 passengers that Western expects to carry in calendar 1972 assuming nonstop competition (45,800 nonstop passengers and 10,190 onestop passengers).[96]

[J.A. 575] Western also made an estimate of operating results for 1973, assuming that Western and Continental would each operate three daily round trips by mid-1973 and that the San Diego-Denver market growth rate from 1972 to 1973 amounted to 20 percent, or double the rate expected by the carrier. On this basis, Western projects a total San Diego-Denver market of 122,200 passengers, with Western carrying 45 percent of the nonstop passengers, or 55,000 passengers. Overall, the carrier estimates that it would carry

[94] This represents 50 percent of the total of 91,620 nonstop passengers.

[95] The loss is computed on the assumption that Western would operate a pattern of one B-727-200 flight and three B-720B flights that was in effect at the time the estimate was made.

[96] Using the same methodology but employing a 1970 base of 74,113 online O&D passengers, Western on brief arrives at a revenue diversion estimate of $991,000. The carrier asserts that since it is likely that this case will not be settled by 1972, the base year for computing diversion under the growth off-set method should be calendar 1970 at the least and preferably fiscal 1971.

77,900 passengers (55,000 San Diego-Denver nonstop passengers and 22,900 beyond passengers), producing passenger revenues of $4,011,227 and total operating revenues of $4,215,800. With operating exepnses at $5,518,440, there would be an operating loss of $1,302,640; allowing for incidental revenues and expenses (net), there would be a loss of $1,377,640.

Western, on brief, furnished two estimates of the operating results of its San Diego-Denver nonstop services in fiscal year 1971 when it was the exclusive nonstop carrier. One of these estimates reflects the carrier's actual results and the other estimate projects what these results would have been had Western not suspended its San Diego-Twin Cities nonstop round trip during the five-month period January-May 1971.[97] Under the first estimates, which Western states is based on company records, the carrier shows total operating revenues of $3,807,000, operating expenses of $3,524,000, and an operating profit of $283,000; deducting $110,000 representing the net of nonoperating income and ex-
[J.A. 576] pense, the net gain before taxes becomes $173,000. Under the other estimate, Western assumes that 30 percent of its San Digo-Twin Cities O&D passengers in the January-May 1971 period would not have flown over the San Diego-Denver segment; with this assumption Western reduces San Diego-Denver nonstop traffic by 5,994 passengers. The adjustment results in total operating revenues of $3,528,000, operating expenses of $3,465,000, an operating profit of $63,000, and after allowing for nonoperating income and expense, a net loss of $47,000 before taxes. From these estimates Western concludes that its San Diego-Denver nonstop service during fiscal 1971 was only mar-

[97] These estimates are set forth in Appendix D to Western's brief and is discussed at pages 29-32 of the brief. Continental has filed a motion to strike Appendix D and page 29, the first four lines of page 30, and the last paragraph of page 31, and Western has filed an answer. These pleadings are disposed of hereafter.

ginally profitable, and that without the San Diego-Twin Cities traffic, the San Diego-Denver nonstop service would have operated as a loss in fiscal 1971.

The Bureau's Passenger Forecast and Estimates of Operating Results and Diversion

The Bureau submitted a passenger forecast for the San Diego-Denver market showing that, after growth and stimulation, the market would amount to 118,520 O&D and connecting passengers in 1972 and 127,409 passengers in 1973. The Bureau's base is Western's reported total of 81,969 online O&D passengers in fiscal 1971; employing a ratio of Western's online O&D passengers to total online O&D passengers equal to 95 percent, the Bureau estimates the total online O&D market in fiscal 1971 at 86,283 passengers.[98] The Bureau then expands this total to include connecting passengers by using a 90 percent ratio of online O&D to total O&D and connecting passengers.[99] In this fashion, the Bureau arrives at a fiscal year 1971 estimate [J.A. 577] showing a total market of 95,870 passengers. With growth at 7.5 percent between fiscal 1971 and calendar 1972, and utilizing a stimulation factor of 15 percent based upon its Q.S.I. methodology, the Bureau calculates the 1972 San Diego-Denver market at 118,520 passengers. With growth at 7.5 percent from 1972 to 1973, the forecast total market for the latter year becomes 127,409 passengers. Finally, according to the Bureau, the 1972 and 1973 market totals would break down as follows:

[98] The Bureau states that the remaining 5 percent of the online O&D passengers would be those carried by United.

[99] The Bureau estimates that 10 percent of the passengers move between San Diego and Denver by connecting carriers or over Los Angeles via surface means or an intra-state carrier between San Diego and Los Angeles.

	1972	1973
Total market	118,520	127,409
Total single-carrier passengers (@ 95%)	112,594	121,039
Total nonstop passengers (@ 90% of single-carrier passengers)	101,335	108,935
New competitor's share (@ 45% in 1972 and @ 50% in 1973)	45,601	54,468

The Bureau furnished projections, by applicant-carrier, of the volume of San Diego-Denver passengers and beyond-passengers each would carry in 1972 and 1973 under their service proposals. These projections are reflected in the following table:

Applicant-Carrier	San Diego-Denver Psgrs.	Beyond-Psgrs.	Total Psgrs	San Diego-Denver Psgrs.	Beyond-Psgrs.	Total Psgrs.
	1972			1973		
Air West	43,321	8,448	51,769	51,745	8,870	60,615
Continental	42,181	42,048	84,229	50,383	45,201	95,584
TWA	45,600	22,950	68,550	54,470	24,670	79,140
United	44,142	24,034	68,176	52,725	25,836	78,561

[J.A. 578] The Bureau's forecasts of the financial results of the service proposals of the carrier-applicants, based upon the Bureau's passenger forecasts for them, show that all but United would earn an operating profit in 1972 and 1973. The Bureau's forecasts of the financial results are summarized in the following table:[100]

[100] All of the expense estimates provide for cost escalation, except Air West's. In the case of Continental, the unit costs actually experienced by the carrier in fiscal 1971 are increased to 1972 and 1973 on a percentage basis, with the average annual cost escalation factor to 1973 being 5.8 percent. The forecast for TWA includes cost escalation at $187,000 in 1972 and $188,000 in 1973;

Item	1972 Air West	1972 Continental	1972 TWA	1972 United	1973 Air West	1973 Continental	1973 TWA	1973 United
Operating revenues (000)	$2,880	$5,818	$5,120	$4,894	$3,373	$6,543	$5,801	$5,555
Operating expenses (000)	2,521	4,725	4,292	3,928	2,711	4,375	4,300	4,274
Operating profit (000)	359	1,093	828	966	662	2,168	1,501	1,281
Self-diversion (000)	—	813	441	1,305	—	863	474	1,377
Net operating profit (000)	—	280	387	(339)	--	1,305	1,027	(96)

As to Continental and TWA, the Bureau observes that while neither carrier would achieve an operating profit in 1972 sufficient to cover a full return on investment, each could be expected to do so in 1973. As to Air West, after including an allowance of $557,000 for return and taxes, the Bureau estimates a subsidy need increase of $198,000 in 1972 and a subsidy need reduction of $105,000 in 1973, or over the first two years of operation, a total subsidy need increase of $93,000.

[J.A. 579] The Bureau's estimates of diversion from Western in the event of certification of San Diego-Denver nonstop competition are geared to the Bureau's passenger forecast, and indicate that, under the growth offset method of computing diversion, Western would suffer diversion of 15,529 passengers and $841,000 in revenues in 1972, and 16,002 passengers and $866,000 in revenues in 1973. The estimates also show, that, under the projected participation method

for United, the amount of cost escalation is estimated at $291,000 in 1972 and $470,000 in 1973.

of calculating diversion, Western's diversion in 1972 would amount to 21,687 passengers and $1,173,000 in revenues, and in 1973, to 28,759 passengers and $1,556,000 in revenues.

In surrebuttal to certain of Western's exhibits, the Bureau estimates that Western with nonstop competition would carry 74,450 passengers on its nonstop services in 1972 (55,734 San Diego-Denver nonstop passengers and 18,716 beyond passengers) and 73,994 passengers in 1973 (54,468 San Diego-Denver nonstop passengers and 19,526 beyond-passengers). In an estimate limited to the revenues and expenses of local/connecting and through traffic moving over the San Diego-Denver segment only on the San Diego-Denver portion of the flights operated, the Bureau indicates that Western would incur an operating loss in 1972 and 1973, as shown in the following table:

Item	1972	1973
Revenues (000)	$4,030	$4,004
Expenses, including cost escalation (000)	4,374	4,645
Operating loss (000)	344	641
Nonoperating revenue/expense (000)	(81)	(75)
Net loss	(425)	(716)

[J.A. 580] In an additional estimate reflecting the revenues and expenses of local/connecting San Diego-Denver and through traffic beyond Denver on flights operating beyond Denver, the Bureau projected that Western would operate at a profit in 1972 and at a loss in 1973, as indicated in the following table:

Item	1972	1973
Revenues (000)	$4,598	$4,619
Expenses, including cost escalation (000)	4,411	4,688
Operating profit or loss (000)	187	(69)
Nonoperating revenue/expense (000)	(81)	(75)
Net profit or loss (000)	106	(144)

On brief, the Bureau made several adjustments in the forecasts it had made in its surrebuttal exhibits relating to the operating results of Western's San Diego-Denver nonstop operations. With these adjustments, the Bureau predicts that if nonstop competition is inaugurated in 1972,[101] Western would realize an operating profit in both 1972 and 1973, as appears from the following table:

Item	1972	1973
Revenues (000)	$4,550	$4,567
Expenses, including cost escalation (000)	4,133	4,242
Operating profit (000)	417	325
Nonoperating revenue/expense (000)	(81)	(75)
Net profit (000)	336	250

[101] Assuming that nonstop competition is not inaugurated until 1973, the Bureau projects total revenues of $4,890,000, total expenses (including cost escalation) of $4,315,000, an operating profit of $55,000, and after allowing for nonoperating revenues and expenses, a net profit of $500,000. The Bureau's forecast on the assumption that nonstop competition is inaugurated in 1973 is based upon the adjusted operating results for 1972 with a single additional adjustment that Western would capture 55 percent of the San Diego-Denver nonstop market or 5,446 additional pasengers. Adjustment of Western's operating results to take account of the additional passenger revenues and the passenger-related expenses increases the projected operating profit for 1973 by $250,000.

[J.A. 581] The adjustments made by the Bureau for 1972 include (1) an increase in the number of San Diego-Twin Cities passengers Western would carry on its San Diego-Denver nonstop flights (from 8,739 to 17,478),[102] (2) a reduction in the amount of cost inflation Western can be expected to experience (from $476,000 to $244,000),[103] (3) a reduction in Western's direct expenses to reflect an overstatement of the block-hours which would be performed on the nonstop services, a corresponding adjustment of the weighted-departure related expenses to reflect a similar overstatement of the number of departures to be performed, and an adjustment in the portion of corporate, general and administrative expenses which are allocated as a percentage of other expenses,[104] and (4) elimination of the amount of

[102] The Bureau estimates that 30 percent of the total San Diego-Twin Cities traffic would move on the San Diego-Denver nonstop service rather than Western's estimate of 15 percent. This percentage increase produces an increase of $520,000 in gross passenger revenues, and after off-setting a corresponding increase of approximately $100,000 in passenger-related expenses, there would be an increase of about $420,000 in Western's operating profit. The Bureau adds that if Western were to carry more than 30 percent of the San Diego-Twin Cities traffic on the San Diego-Denver nonstops—a matteer wholly within the carrier's control, it would show a substantial increase in operating profit.

[103] The Bureau substitutes a cost inflation rate of three percent annually in lieu of Western's cost inflation factor of 6.8 percent annually, and calculates that the use of three percent annual inflation allowance would increase the operating profit in 1972 by $312,000. According to the Bureau, the three percent rate is a generous allowance; if the rate of inflation in Western's cost turns out to be less than three percent—which is the Bureau's expectation—Western's operating profit could be expected to increase further, by up to approximately $250,000.

[104] The Bureau alleges that Western improperly relied upon a 100 percent performance factor in calculating block-hours and aircraft departures. According to the Bureau, the net effect of the adjustment would be to increase Western's operating profit by $96,000 for 1972 before cost escalation and by $102,000 after cost escalation, using the Bureau's three percent cost inflation factor.

[J.A. 582] $81,000 representing net nonoperating revenues and expenses from the operating results for 1972.[105] The sum of these four adjustments [106] results in an increase of $842,000 in Western's 1972 operating profit.

Civic Party San Diego-Denver Passenger Forecasts

The San Diego Parties and the Denver and Colorado Parties submitted San Diego-Denver passenger forecasts. Based upon a historic average annual growth rate of 20.2 percent during the 1962-1969 period and starting with a 1968 local O&D passenger base, the San Diego Parties estimate 1972 traffic at 171,751 local O&D and interline connecting passengers, and the 1973 level at 206,445 such passengers. Using a more recent annual growth rate of 15.4 percent reflecting an increase from 1968/69 to 1969/70, the San Diego Parties predict the 1972 market at 151,987 passengers and the 1973 market at 175,392 passengers. In arriving at these forecast results, the San Diego Parties employ a ratio of 37.7 percent between interline connecting traffic and local O&D passengers based upon the average for the period 1967-1969, and a stimulation factor of 33 percent, citing Appendix A to Order 71-4-112. These parties note

[105] The Bureau points out that this item is not properly included in an estimate of Western's operating results; rather, since it consists largely of interest expense netted against interest income, it is properly a portion of the carrier's return element. Removal of the item in question results in an increase of $81,000 in Western's operating profit in 1972.

[106] In addition to the foregoing adjustments, the Bureau points out that in computing San Diego-Denver traffic, it used a conservative growth factor which should be surpassed, that it employed Western's 18 percent dilution factor rather than a reduced dilution factor taking account of Continental's proposed economy service, and that the Bureau's adjustments do not reflect any savings in expenses which would result from the employment of one B-737-200 schedule under Western's proposed service pattern in lieu of one B-720B flight.

that their traffic estimates make no allowance for (1) online through or online connecting traffic or (2) an apparent understatement, by an average of 9 percent, of Western's San Diego-Denver traffic in the Board's traffic surveys for calendar 1969 and fiscal 1970.

[J.A. 583] The Denver and Colorado Parties in their direct exhibits forecast a 1972 San Diego-Denver market of 112,100 true O&D and connecting passengers and a 1973 market of 150,000 such passengers after growth and stimulation. In their forecasts they start with a base of 1969 true O&D passengers as shown in the Board's traffic surveys; add connecting passengers based upon historic and projected ratios of connecting passengers to true O&D passengers; employ a growth rate of 6 percent 1969-1970, 4 percent 1970-1971, and 8.77 percent 1971-1972 and 1972-1973; and utilize a service quality technique for service stimulation (10 percent, 1969-1970; 5 percent, 1970-1971; and 15 percent, 1971-1972). To estimate 1973 traffic, the parties employ 10 percent service stimulation and 10 percent stimulation for nonstop competition. In their rebuttal exhibits the Denver and Colorado Parties make adjustments to the traffic forecasts of each of the carrier-applicants to reflect their respective proposed services under the service quality technique employed by the Denver and Colorado Parties. In this fashion they arrive at a 1972 forecast ranging from a high of 128,576 true O&D and connecting passengers to a low of 107,146 passengers,[107] and a 1973 market ranging between a 141,690 high and a 118,075 low.[108]

Frontier's Estimate of Diversion

Frontier furnished an estimate of diversion in its statement of position. The local service carrier submits that if

[107] Air West, 128,576 pasengers; Continental, 112,504 passengers; TWA, 107,504 passengers; and United, 112,504 passengers.

[108] Air West, 141,690; Continental, 123,978; TWA, 118,075; and United, 123,978.

Continental is certificated for San Diego-Denver nonstop service and operates two daily through-plane round trips in the San Diego-Kansas City market, Frontier would be sub-
[J.A. 584] ject to diversion of $135,000 in 1972 and $145,000 in 1973 (with net diversion estimated at $252,000 for the two-year period) in the Denver-Kansas City, Kansas City-Las Vegas, and Denver-Las Vegas markets. Frontier states that this diversion estimate is exclusive of diversion that would be inflicted in the Colorado Springs, Wichita, Oklahoma City and Tulsa markets which Continental includes in its service proposal. In the event that United receives a San Diego-Denver nonstop award and operates its proposed services beyond Denver to Lincoln and Omaha, Frontier estimates that it would be subject to diversion of $115,000 in 1972 and $123,000 in 1973 (with actual diversion amounting to at least $210,000 for the two-year period) in the Denver-Lincoln and Denver-Omaha markets. Frontier adds that this estimate of diversion by United is actually understated since it is based upon fiscal year 1970 traffic survey data and the local service carrier did not commence its Omaha-Denver nonstop service until the last quarter of calendar year 1970.

Findings and Conclusion

As previously indicated, it is concluded that the public convenience and necessity require the authorization of first competitive nonstop service between San Diego and Denver on an unrestricted basis. It is additionally concluded that Continental should be selected to operate the required service and that the applications of Air West, TWA, and United should be denied.[109] The justification for these conclusions follows.

[109] While there is technically in issue the possibility of selecting more than one carrier to operate competitive nonstop service in the San Diego-Denver market, no party contends that two carriers should be chosen to compete with Western, and the record does not justify certification of more than one nonstop carrier in addition to Western.

[J.A. 585] 1. *Public Convenience and Necessity for Nonstop Competition.* The decision herein to certificate a second San Diego-Denver nonstop carrier is predicated upon three prime considerations. First, the market will be clearly large enough in the forecast years to warrant authorization of competitive nonstop service under normal circumstances. Second, there are serious deficiencies or omissions in the services operated by Western in the market justifying the authorization of a second nonstop carrier in order to provide the incumbent monopoly carrier with the spur of effective competition and to provide the market with new and improved services. Third, Western will be able to achieve a substantial operating profit on its San Diego-Denver nonstop operations in each of the forecast years in competition with an additional nonstop carrier, and neither Western nor any other carrier will suffer harmful diversion of significant magnitude in consequence of the authorization of nonstop competition.

a. *Size of San Diego-Denver Market.* The Bureau, the applicant-carriers, Western, the San Diego Parties, and the Denver and Colorado Parties made passenger forecasts of the San Diego-Denver market for 1972 and 1973 after growth and stimulation, assuming the inauguration of competitive nonstop service in 1972. These forecast totals are tabulated as follows:

[J.A. 586] Party	Forecast 1972 psgrs.	Forecast 1973 psgrs.
Bureau	118,520	127,409
Air West	120,637	132,701
Continental	103,932	111,727
TWA	96,830	111,355
United	97,041	101,983
Western	101,800	122,200 [110]
San Diego Parties	161,869 [111]	190,919 [112]
Denver and Colorado Parties	[113]	123,978 [114]

It is found that the Bureau's forecast of 118,520 San-Diego-Denver passengers in 1972 (324 per day) and 127,-409 in 1973 (348 per day) should be accepted as reasonable in view of the soundness and conservatism of the forecasting technique employed. Thus, by employing as a traffic base Western's reported online O&D passengers moving between San Diego and Denver in fiscal year 1971, rather than the true O&D and connecting passengers in fiscal year 1970 as shown in the Board's traffic surveys, which is the latest sur-
[J.A. 587] vey period for which data are available, the Bu-

[110] This forecast assumes that Western and Continental each operate three daily round trips by mid-1973 and that the growth rate from 1972 to 1973 is 20 percent or double the rate expected by Western.

[111] This is an average of a low forecast of 151,987 passengers and a high forecast of 171,751 passengers.

[112] This is an average of a low forecast of 175,392 passengers and a high forecast of 206,445 passengers.

[113] Dependent upon the service proposed, the Denver and Colorado Parties made estimates ranging from a low of 107,146 passengers to a high of 128,576 passengers.

[114] This is a median estimate dependent on the service proposed. The low estimate is 118,075 passengers and the high is 141,690 passengers.

reau used the more reliable traffic base. This is so for several reasons: (1) Western's online O&D data are more current by one year (fiscal 1971 vs. fiscal 1970); (2) Western's data represent a complete count of passengers whereas the Board's surveys use a 10 percent sample; and (3) the Board's survey data for the San Diego-Denver market, on this record, substantially understate the number of passengers moving in the market, and, for fiscal year 1970, include the period of Western's strike, July 29-August 15, 1969. Significantly, Western itself used its fiscal year 1971 company data in making its forecast of the 1972 San Diego-Denver market.[115] Unlike Western, however, the Bureau properly expanded the base year traffic to include passengers moving between San Diego and Denver on services other than Western's. This expansion included (1) online O&D passengers carried by United, (2) passengers moving on connecting air services, primarily via Los Angeles, and (3) passengers using certificated air service between Los Angeles and Denver and moving over the San Diego-Los Angeles portion of their total trip by surface means or on a scheduled intrastate air carrier.

The Bureau's projected growth rate is more conservative than that used by Western. Thus, the Bureau used a total growth rate of 7.5 percent for the entire 18-month period July 1, 1971-December 31, 1972. By way of contrast, Western employed a 5 percent growth rate for the six-month period July 1, 1971-December 3, 1971 (which is an annual rate of 10 percent) and an additional 7.5 percent growth rate for calendar year 1972.

[J.A. 588] The Bureau also estimated stimulation at 15 percent compared to Western's lower estimate of 10 percent for first competitive nonstop service. The Bureau's stimulation factor is based upon its Q.S.I. methodology which it has tra-

[115] United and Air West did likewise.

ditionally employed in the Board's route proceedings.[116] On the other hand, as pointed out by Air West, Western has traditionally employed a 15 percent stimulation factor for first competitive service in numerous cases in which it has sought new route authority.[117] Its reduced 10 percent stimulation factor is based upon pure company judgment, without any established foundation in Board precedent or economic fact.

Based upon the foregoing analysis, there is no sound reason to dispute the Bureau's 1972 San Diego-Denver forecast. Furthermore, since the Bureau employed a 7.5 percent growth factor to expand the 1972 total market to 1973 compared to Western's projection of a 10 percent growth for the year, it is manifest that the Bureau's 1973 passenger forecast is on the conservative side. Also, of course, the forecasts do not include the substantial number of passengers carried between San Diego and Denver who would move beyond Denver to points north and east.

[J.A. 589] b. *Caliber of Western's Service.* Entirely apart from the size of the San Diego-Denver market, it is found that the volume and quality of Western's service are such as to justify and require the authorization of nonstop competition in the market. At the outset, it must be observed that although Western prosecuted its application in this case on the basis of a service proposal projecting the operation of three daily nonstop roundtrips, the carrier from the

[116] It would appear that the Bureau's stimulation factor is conservative to the extent that it does not allow for stimulation due to the economy fares proposed by Continental, the carrier selected for the competitive nonstop award.

[117] Western in the initial phase of this case used a 20 percent stimulation factor for first nonstop service in the San Diego-Denver market. In light of the Board's use of a 33 percent stimulation factor in Order 71-4-112, April 16, 1971, Appendix A, page 2, assuming nonstop operations by Western and Continental, the minimum stimulation percentage by simple arithmetic should be 13 percent for first competitive nonstop service.

time of inauguration of its nonstop services has uniformly operated only two daily nonstop round trips. It has not experimented with a third nonstop frequency and does not plan to add another nonstop round trip until the middle of 1972. The fact that Western's two daily nonstop round trips are complemented by three additional onestop flights eastbound and four such flights westbound is no justification for the carrier's extended delay in inaugurating a third daily nonstop frequency.

Moreover, there is a need for improvement in the timing of Western's San Diego-Denver departures. Thus, in an eastbound direction Western's earliest departure is at 8:10 a.m. and its latest is at 3:50 p.m., leaving a period of 16 hours in which there is no eastbound service, nonstop or onestop; westbound, the carrier's departures, nonstop and onestop, are provided between 9:20 a.m. and 8:00 p.m.[118] Because there is no prime time eastbound departure in the evening, the San Diego business man traveling to Denver on the 3:50 p.m. schedule loses a substantial part of his business day in San Diego; and because there is no eastbound departure prior to 8:10 a.m., the San Diego business man arriving in Denver at 11:05 a.m. is unable to conduct a full day's business in the Colorado city. In a re- [J.A. 590] verse direction, the problem is equally serious. A Denver business man traveling to San Diego on the earliest departure (at 9:20 a.m.) arrives at 11:09 a.m. and has only until he leaves to board the 3:50 p.m. flight eastbound to conduct his business in San Diego. Of course, whether the schedules are eastbound or westbound, the business day is curtailed by travel to and from the airport, checking and obtaining baggage, and lunch at the destination city after arrival on the morning flight.

As for the nonstop schedules themselves, there is only one flight in each direction at prime time, namely, the San

[118] Western has no westbound schedules of any kind between 11:20 a.m. and 5:00 p.m.

Diego departure at 8:10 a.m. and the Denver departure at 6:30 p.m. The eastbound nonstop is scheduled in the mid-afternoon (3:50 p.m.) and the westbound nonstop in the mid-morning (10:50 a.m.) There is no nonstop service eastbound between 8:10 a.m. and 3:50 p.m., and none westbound between 10:50 a.m. and 6:30 p.m.

Analysis of Western's schedules, both nonstop and one-stop, establishes also that the carrier serves the San Diego-Denver market only as part of long-haul flights. Of the 11 schedules operated (five eastbound and six westbound), there is not a single San Diego-Denver turnaround flight Eight of the 11 flights serve points beyond both San Diego and Denver; only three originate or terminate at either San Diego or Denver. Of the four nonstops, not one originates or terminates at San Diego, only one originates at Denver, and only one terminates at Denver. Nine of the 11 schedules originate or terminate at Twin Cities, which is at least 693 miles from Denver; and five of the 11 schedules originate or terminate at Portland, Seattle, or Vancouver, which are from 933 to 1,175 nonstop miles from San [J.A. 591] Diego.[119] Five of the 11 schedules originate or terminate at Los Angeles or San Francisco where air traffic and ground congestion are productive of flight delays. In short, the great emphasis of Western's schedule pattern appears to be on longer-haul operations, with the San Diego-Denver segment used primarily as a bridge or adjunct to the longer-haul services.

Additionally, load factors on Western's San Diego-Denver flights, nonstop and onestop, demonstrate that the traveling public in the market is not being adequately accommodated by the carrier's pattern of services. While the record as to nonstop services shows that the carrier's overall on-

[119] The mileages are actually substantially greater since Western does not operate the beyond-portions of the flights on a nonstop basis.

board load factor in fiscal year 1971 (the first complete year for such services) averaged a modest 47.6 percent, that the average monthly on-board load factor in that period at no time exceeded 55.3 percent, and that the highest average monthly on-board coach load factor in fiscal 1971 was a not unduly high 58.8 percent, an examination of the average monthly on-board coach load factors, by nonstop flight, reveals that since the inauguration of nonstop service in June 1970, the prime time morning departure eastbound had average monthly on-board coach load factors which were never lower than 51.2 percent, reached a ceiling of 88.9 percent, and were in the 60's in four months, in the 70's in six months, and in the 80's in three months. Additionally, the prime time evening departure westbound had average monthly on-board coach load factors which did not dip below 55.4 percent, attained a high of 79.5 percent, and were in the 60's in seven months and in the 70's in five months. It is evident from these average monthly on-board coach load factors that Western must have unreasonably high coach load factors on many individual nonstop flights operating at prime times, and that many passengers are unable to obtain coach accommodations on such departures.

[J.A. 592] The average monthly on-board coach load factors on Western's other two daily nonstop schedules tell a different tale. Thus, on the late-afternoon San Diego departure operated since January 1971, the average monthly on-board coach load factor was generally in the 30's and 40's, except for the summer months of July and August when it reached 51.0 percent and 58.8 percent, respectively. On the late-morning Denver departure, the average monthly on-board coach load factor was generally in the 20's and 30's, except for July and August when it was 50.8 percent and 55.8 percent, respectively. There can be no question that the substantially lower coach load factors prevailing on these nonstop flights in comparison to those on the prime time departures were due to unresponsive scheduling on Western's part and not to lack of public demand.

Looking at Western's onestop San Diego-Phoenix-Denver schedules, while the average on-board coach load factor for calendar 1970 on the San Diego-Phoenix segment was 55.6 percent and there were only three months in that year when the average on-board coach load factor climbed into the 60's, reaching a high of 66.9 percent, the average on-board coach load factor on the Phoenix-Denver segment in 1970 was 70.7 percent, with a high of 82.9 percent in one month and a low of 60.3 percent. Indeed, on-board coach load factor data for the Phoenix-Denver segment in 1970 show six months when the average was in the 60's, five months in the 70's, and one month in the 80's.

A flight-by-flight analysis of the on-board coach load factors in Western's onestop schedules in the 10-month [J.A. 593] January-October 1971 period is even more indicative of unreasonably high load factors. Thus, on Western's three daily eastbound departures, the on-board coach load factors were as follows:

San Diego Departure	Months Between:	San Diego-Phoenix	Phoenix-Denver
Midday	70- 79%	7	4
	80- 89%	3	4
	90-100%	-	2
Morning	40- 49%	1	-
	50- 59%	4	-
	60- 69%	4	1
	70- 79%	1	2
	80- 89%	-	6
	90-100%	-	1
Mid-afternoon	40- 49%	2	-
	50- 59%	7	-
	60- 69%	1	4
	70- 79%	-	6

From this table, it appears that the monthly on-board coach load factor on the midday departure was never under 70 percent, regardless of sector; that it was never under 60 percent on the morning and mid-afternoon departures on the Phoenix-Denver sector; and that on the San Diego-Phoenix sector it was over 60 percent in five months on the morning departure and in one month on the mid-afternoon departure.

The following table reflects Western's on-board coach load factors on its four daily westbound onestop schedules in the San Diego-Denver market:

[J.A. 594]

Denver Departure	Months Between:	Denver-Phoenix	Phoenix-San Diego
Morning	30- 39%	-	2
	40- 49%	-	7
	50- 59%	2	1
	60- 69%	4	-
	70- 79%	2	-
	80- 89%	1	-
	90-100%	1	-
Midday	50- 59%	-	2
	60- 69%	1	2
	70- 79%	2	6
	80- 89%	4	-
	90-100%	3	-
Evening	70- 79%	6	2
	80- 89%	4	8
Late evening	50- 59%	-	1
	60- 69%	1	4
	70- 79%	5	4
	80- 89%	4	1

From this table, it appears that the monthly on-board coach load factor on the evening departure was never under 70 percent, regardless of sector; that it was not under 60 percent, except in one month, on the late evening departure, irrespective of sector; that on the midday departure it was never under 60 percent, except in two months, on either sector; and that on the morning departure it was over 60 percent in eight of the 10 months on the Denver-Phoenix sector and never over 60 percent on the Phoenix-San Diego sector. From the foregoing analysis of Western's San Diego-Phoenix-Denver schedules, it is apparent that there were a great many flights in each direction on which a would-be traveler was unable to obtain a coach seat.

[J.A. 595] Summing up with respect to Western's San Diego-Denver services, it is concluded that they have many

serious inadequacies.[120] Only two daily nonstop flights are operated in each direction, and only one such schedule each way is operated at a prime departure time. The nonstop and onestop schedules are operated as a bridge in, or adjunct to, long-haul services, instead of being directed primarily to the needs of the local San Diego-Denver market, and there are extensive time gaps in the overall service pattern and excessively high coach load factors on an exceptionally large number of individual nonstop and onestop flights. Based upon such considerations, it is necessarily found that passengers who would prefer to travel on nonstop flights at prime departure times at coach fares are discommoded. They are forced to travel at first-class fares, or on less attractive nonstop departures, or on onestop schedules. Undoubtedly, too, a large number of passengers make travel arrangements which do not utilize Western's services at all. Such passengers move on United's single-carrier services over Los Angeles, or on interline connecting services via Los Angeles, or travel Los Angeles-Denver on a certificated air carrier and the San Diego-Los Angeles portion of the trip by surface means or intrastate air carrier.

c. *Financial Impact of Nonstop Competition Upon Western and Other Carriers.* It is found that, as forecast by the Bureau on brief, Western would be able to achieve a substantial operating profit on its San Diego-Denver nonstop serv- [J.A. 596] ices in each of the forecast years in competition with a second nonstop carrier. Western itself forecasts an operating loss and a pre-tax loss in each forecast year in connection with Air West or with Continental or another trunkline carrier. Thus, Western projects that, competing with Air West, it would sustain an operating loss of $479,609 and a pre-tax loss of $560,609 in 1972, and an operating

[120] In addition to the inadequacies in Western's San Diego-Denver services, there are also indicia, as claimed by Continental, that Western's promotion of the San Diego-Denver market, particularly in the area of tourism and convention business, has not been fully adequate and lacks aggressiveness.

loss of $448,410 and a pre-tax loss of $523,410 in 1973; and that in competition with Continental or another trunkline carrier, Western would suffer an operating loss of $764,274 and a pre-tax loss of $839,274 in 1973. However, the Bureau projects, and it is so found, that with appropriate adjustments in Western's estimates of its operating results, the carrier could operate its nonstop services in competition with another carrier and realize an operating profit of $417,000 and pre-tax earnings of $336,000 in 1972 and an operating profit of $325,000 and pre-tax earnings of $250,000 in 1973, on the assumption (also made by Western) that nonstop competition is inaugurated in 1972.

The principal areas of difference between the Western and the Bureau forecasts, on the revenue side, relate to the number of passengers Western can be expected to carry in 1972. The carrier estimates that in competition with a trunkline carrier it would carry a total of 64,900 passengers on its nonstop services, compared to the Bureau's forecast total of 80,063 passengers, as shown in the following table:

[J.A. 597]

Market	Western	Bureau
San Diego-Denver	45,800	55,734
San Diego-Twin Cities	8,500	17,478
San Diego-Sioux Falls	2,400	2,262
San Diego-Calgary	2,300	947
All other beyond traffic	5,900	7,642
Totals	64,900	84,063

In the San Diego-Denver market, where there is a difference of approximately 10,000 passengers between the two forecasts, Western projects a total market of 101,800 passengers, estimates that 90 percent of this total will move on nonstop flights, and assumes that the two competitors will divide the nonstop market equally. On the other hand, the Bureau forecasts a total San Diego-Denver market of 118,529 passengers, estimates that 95 percent or 112,549

passengers will move on single-carrier services, and that 101,335 passengers or 90 percent of the single-carrier passengers will travel on nonstop flights; the Bureau then projects that Western and the new competitor will divide the nonstop traffic on a 55:45 basis, with Western obtaining 55,734 nonstop passengers and the new competitor 45,601. The material differences between the Western and Bureau forecasts of the number of nonstop passengers Western would carry lie in the total nonstop market estimates and the participation factors employed. It is found that the Bureau's estimates of the total nonstop traffic—101,335 passengers—and the division of such traffic in the first year of operations [121]—55:45—are more reliable than Western's—91,600 passengers and 50:50. Supporting the Bureau's forecast of a 55:45 split are the facts that [J.A. 598] Western is a long-entrenched carrier in the San Diego-Denver market (Continental has no station at San Diego), has a substantial headstart in the operation of nonstop service, having begun such service on June 8, 1970, and because it (in competition with Continental) would supplement its nonstop operations with onestop schedules, will be able to advertise a wide overall spread of departure times more attractive to San Diego-Denver passengers than the competitor's limited number of nonstop flights.

As to the beyond-traffic, the major difference between the Western and Bureau forecasts concerns the San Diego-Twin Cities traffic expected to move on Western's San Diego-Denver nonstop flights, with the Bureau forecasting 17,478 passengers as compared to Western's projection of 8,500 passengers. The carrier forecasts that it will obtain 15 percent [122] of the 1972 market of 56,900 passengers (fiscal

[121] It should be noted that for 1973, the second year of operations, the Bureau predicts a 50:50 split in the nonstop traffic.

[122] While Western's exhibits state that the 15 percent factor is based on "Western's experienced traffic flow," the testimony at the hearing discloses that it is not derived entirely from actual traffic experience in the past, but also includes a judgment element.

year 1971 market of 54,197 passengers expanded to calendar 1972 with growth at 5 percent). The Bureau, on the other hand, estimates Western's San Diego-Twin Cities passengers moving on the carrier's San Diego-Denver nonstops at 30 percent of the 1972 market of 58,262 passengers (fiscal year 1971 market of 54,197 passengers grown at 7.5 percent to calendar 1972). The Bureau's 30 percent factor is accepted as reasonable. The San Diego-Twin Cities market is a Western monopoly market, and by far the largest beyond market available to support Western's San Diego-Denver nonstop operations. Western does not now operate nonstop service in the market. The record shows that in a sample period (first week of May 1971) when the carrier did not provide the market with nonstop [J.A. 599] service, about 40 percent of Western's online O&D passengers in the market traveled on the carrier's San Diego-Denver nonstop flights. It further appears that in 1970, when Western furnished the San Diego-Twin Cities market with nonstop service throughout the year, it achieved an average load factor of 29.7 percent for the year, with an average load factor as high as the 40's in only two months; and that in 1971 when Western provided nonstop service only in the June 10-September 7 period (except for the first five days of January), it achieved load factors of 20.7 percent, 27.0 percent, and 30.8 percent in June, July, and August, respectively. Western has plans, which are not finalized, for resumption of San Diego-Twin Cities nonstop service some time in the second quarter of 1972, but the carrier is unable to say precisely when or for how long the service will be operated.[123] Considering the experienced low load factors on the nonstop service in the past, it is unlikely that Western will continue nonstop service on a year-round basis until the market develops from its present level. On the probability that Western will not operate nonstop serv-

[123] On brief, Western states that it is logical to assume that once the economy recovers, the San Diego-Twin Cities market will once again be able to support nonstop service on a 12-month basis.

ice in 1972 except during the three summer months, it is strongly suggested that Western is more likely to carry 40 percent of the San Diego-Twin Cities traffic on its San Diego-Denver nonstops than Western's estimate of 15 percent. The 30 percent participation which the Bureau forecasts is conservative, particularly since Western, as the monopoly carrier with control over the San Diego-Twin [J.A. 600] Cities schedules operated, can control the level of traffic which will flow over the San Diego-Denver nonstop segment.[124]

The Bureau's forecast for the revenue aspects of Western's estimate of the financial results of its San Diego-Denver nonstop operations with nonstop competition makes adjustments only for the foregoing considerations. However, other adjustments would further improve the revenue posture of Western's forecast. Thus, Western employs a forecast dilution rate of 18 percent based upon a passenger mix of first-class, coach, and economy fares. This dilution rate, however, approximates the 18.4 percent dilution rate actually experienced by the carrier with a mix limited to first-class and coach. Should Western adopt an economy fare in order to compete with Continental as the second nonstop carrier, it is clear that Western's dilution rate will be substantially lower than 18 percent and its revenues increased materially.[125]

[124] As pointed out by Air West, Western could gain additional traffic support for its San Diego-Denver flights by routing them on to the Twin Cities, since Denver is the logical intermediate point for a San Diego-Twin Cities routing, involving circuity of only one mile over a nonstop routing. Also, as Continental observes, with competitive pressure in the San Diego-Denver market, Western would undoubtedly route more of its San Diego-Twin Cities traffic over the San Diego-Denver nonstops rather than keep such traffic relegated to the use of multi-stop flights.

[125] The Bureau estimates that if Western's dilution rate is reduced to 16 percent (representing Continental's domestic mainland dilution experience) as suggested by Continental, Western's reve-

Additionally, it appears that Western's "other operating revenues" are understated. Western calculated "other revenues" by applying a 5.1 percent factor to its forecast passenger revenues, based upon its experience for fiscal year 1971. According to Air West, Western's 5.1 percent factor accounts only for property revenues and makes no allowance for mail revenues and charter revenues. Air West [J.A. 601] indicates that in fiscal year 1971 Western's "other revenues" amounted to 8.8 percent of its passenger revenues, and that using this percentage, there should be an increase of $135,631 in Western's forecast of total operating revenues.

Moreover, in addition to projecting beyond-Denver passengers in three specific markets, Western increased its total traffic forecast by 10 percent "for all other beyond traffic." Western's evidence does not provide a factual justification for the 10 percent factor, and as noted by Air West, a compilation of the minimum beyond-traffic which Western has available to support San Diego-Denver nonstop operations establishes that the 10 percent figure is substantially understated.

Turning to the expense side of Western's projected operating results for its nonstop operations, one of the principal discrepancies between Western and the Bureau involves the carrier's estimate of block-hours and weighted departures and the related direct expenses and indirect expenses, respectively. Thus, as the Bureau correctly observes, Western improperly assumed that it would achieve a 100 percent performance factor [126] and in so doing over-

nues would be increased by nearly $100,000; and that if it is reduced to 12 percent (representing Continental's experience for route segments in the 800-900 mile stage length), Western's revenues would be increased by almost $300,000.

[126] Western concedes that under certain circumstances the use of a 100 percent performance factor may not be appropriate, but attempts to justify for such a factor here on the ground that it took no credit for extra sections and charter flights that would be flown in the San Diego-Denver market. However, there is no evidence that such activity would offset the added weighted departure and block hour costs included in Western's forecasts; in any event, the operation of the extra sections and charter flights would serve to increase revenues over and above the revenues projected by Western.

states the number of block-hours and weighted departures [J.A. 602] required in its operations for calendar 1872 and 1973. These overstatements result in overstatements of the carrier's forecast of direct expenses and indirect expenses as well as the portion of the carrier's general and administrative expenses allocated as a percentage of other expenses; appropriate adjustments for these overstatements would increase Western's operating profit (before escalation) by $96,000 in 1972 and 1973 and the carrier's operating profit (after escalation using a three percent inflation factor) by $102,000 in 1972 and by $105,000 in 1973.

An additional difference between Western and the Bureau lies in the amount of cost escalation the carrier is likely to experience. Western calculates its cost inflation expense by individual cost items to which it applies various percentage increases related to past experience. Analysis of Western's forecasts by the Bureau discloses that the carrier includes a total of $476,000 for cost inflation through calendar 1972 [127] and $750,000 through 1973. Further analysis reveals that the carrier's inflation factor, expressed as a percentage of the cash expenses incurred during the calendar 1970 base period, is approximately 6.8 percent compounded annually (14 percent for the two-year period 1971 through the 1972 forecast year). This cost inflation rate is substantially higher than the factor employed by the other trunkline carrier-applicants (Continental, 5.8 percent; TWA, 5.0 percent; United, 4.2 percent), and it is

[127] Air West's analysis indicates that Western's cost inflation forecast for 1972 amounts to $486,323.

apparent from data furnished by Air West that, excluding from consideration calendar 1969 when Western endured a strike, the carrier's forecast inflation percentage is far in excess of its system experience in recent years. Moreover, Western makes no offsetting adjustments in its estimate [J.A. 603] of cost inflation which would reflect decreases in costs due to technological improvements, productivity increases, and its own historic unit cost trends. Recognizing also that Western's estimates were prepared before the President's New Economic Program was announced, nevertheless it is manifest that the program will slow down to some extent the cost increases experienced by all carriers in the industry and must be taken into account in assessing the rate of cost inflation that Western will incur. Finally, Western's estimate of cost inflation makes no allowance for future fare increases as an offset against future wage and price increases, at least to some extent.

In light of the foregoing considerations, the Bureau projects an annual cost inflation rate of three percent for Western, which would amount to six percent through 1972 and nine percent through 1973. This projection is accepted as reasonable. Recalculation of Western's forecast operating results with a three percent annual inflation allowance results in a decrease in operating expenses in the amount of $312,000 in 1972.

Another area of expense savings which can be made in Western's forecast of operating results for its San Diego-Denver nonstop operations involves the carrier's expenses in consequence of the types of aircraft upon which the forecast is based. Thus, the carrier assumed that it would operate a total of four daily nonstop flights, one with B-727-200 aircraft and three with B-720B equipment. If, as suggested by the Bureau, Western were to operate one flight with B-737 aircraft instead of a B-720B, this would decrease the carrier's direct aircraft operating expenses as well as those indirect expenses which are based on weighted de-

partures. The Bureau points out that Western operated nonstop service in the market with B-737 aircraft as late [J.A. 604] as September 7, 1971, and that the inclusion of one such flight in the four daily flight pattern would result in pre-inflation savings of approximately $230,000.[128] Air West also attempts to reconstruct Western's forecast on the assumption that the carrier would conduct an all-B-727-200 operation as it had proposed to do in the original phase of this proceeding and as the Board had assumed in its forecast of operating results when it made its award to Western. On the basis of such an adjustment Air West shows that Western could achieve savings of $279,841 in direct operating expenses. Further, on the assumption that one B-727-200 and one B-737 round trip would be operated in lieu of an all-B-727-200 operation, there would be additional savings of $193,216, making a total of $473,057 in aircraft operating expense, before cost escalation. In short, Western can operate its San Diego-Denver nonstop flights with aircraft just as efficient and less expensive to operate than those on which its forecast is based, and thereby sharply reduce its estimated expenses.

Finally, the Bureau properly adjusts Western's projected revenue and expense forecast for its nonstop operations so as to exclude an item entitled "non-operating revenues and expenses—net" in the negative amount of $81,000 for 1972 and the negative amount of $75,000 for 1973. As rightfully submitted by the Bureau, this item does not belong in the carrier's operating results since its consists largely of interest expense netted against interest income.

[J.A. 605] Summing up, the Bureau's adjustments to Western's forecast of operating results for its nonstop operations establish that Western would realize an operating profit of at least $417,000 (after cost escalation) in 1972 and

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[128] Explaining that this estimate is only a rough approximation, the Bureau does not include the expense savings in its reconstruction of Western's forecast.

$325,000 (also after allowance for inflation) in 1973 in nonstop competition. These are highly conservative estimates since, as has been indicated, they are based upon conservative methods and even then do not include all of the possible adjustments in revenues and expenses set forth.[129]

Not only would Western realize a healthy operating profit on its nonstop operations in competition with a second nonstop carrier, but also it would not incur diversion of serious proportions due to the nonstop operations of a competitor. Under the growth-offset theory and using Western's reported fiscal year 1971 online O&D passengers as a traffic base, the Bureau forecasts that Western would suffer diversion of 15,529 passengers and $841,000 in passenger revenues in 1972 and 16,002 passengers and $866,000 in passenger revenues in 1973 under the Bureau's traffic forecast for the San Diego-Denver market. However, the Bureau's diversion estimate is overstated since the fiscal year 1971 base traffic includes nonstop passengers carried by Western pursuant to the award to the carrier in the original phase of this case. Western is not entitled to credit, in computing diversion, for traffic gained from its [J.A. 606] nonstop operations inasmuch as this is not a new route case but a remanded proceeding involving a continuation of the earlier phase. The whole case must be considered in calculating diversion just as if the authorization of Western and a nonstop competitor were in issue, and the diversionary impact upon Western must be measured using a base year before the carrier obtained nonstop authority. In any

[129] Western's estimate, on brief, of the operating results of its San Diego-Denver nonstop services in fiscal year 1971 will not be entertained. The estimate is based in material part upon data from company records which were not presented as evidence at the hearing and which, therefore, parties to this proceeding were unable to submit to the test of cross-examination. In any event, the critical question is not what Western's operating results were in fiscal year 1971 as the exclusive nonstop carrier, but what they would be in calendar 1972 and 1973 in nonstop competition.

event, the Board's supplemental opinion and order on reconsideration and its order on remand make it clear that the concern of the majority is not with revenue diversion as such, but with whether Western will be able to operate profitably in the San Diego-Denver market in the forecast years competing against another nonstop carrier. As has been previously found, the clear answer is in the affirmative.

There is the further question of the diversionary effect of a competitive nonstop award upon Frontier, a subsidized local service carrier. Frontier is not an applicant for the San Diego-Denver nonstop authorization, did not intervene under Rule 15 in this case, and, while it was a Rule 14 participant, did not offer evidence or participate in the hearing. Its only submission in this case entitled to consideration is a statement of position in which it maintains that neither Continental nor United should be certificated as the second nonstop carrier because of the diversionary impact upon Frontier due to through-plane and single-carrier services which could be operated in beyond-Denver markets served by Frontier. However, the carrier's estimates of diversion contained in its statement of position were not submitted in exhibit form so that it was not possible to subject them to the scrutiny of rebuttal exhibits and cross-examination. In any event, it is found that the diversionary [J.A. 607] harm incurred by Frontier would be limited in magnitude and, in all the circumstances, should not preclude a finding of public convenience and necessity for nonstop competition in the San Diego-Denver market.

Based upon all of the foregoing considerations, it is concluded that the public convenience and necessity require the authorization of first competitive nonstop service between San Diego and Denver.

2. *Selection of Carrier.* In the original portion of this case the examiner chose Continental over Air West, TWA, and United to operate the required San Diego-Denver non-

stop service in competition with Western. The record developed in this reopened and remanded proceeding does not require any change in the examiner's choice of carrier.

Continental will provide vigorous, effective competition to Western which should spur that carrier to be more responsive in its San Diego-Denver services to the needs of the traveling public.[130] Continental will also aggressively promote the untapped tourist and convention potential of the San Diego-Denver market. Additionally, Continental has presented an attractive service plan. Its proposed nonstop schedules will increase the daily volume of San Diego-Denver nonstop service from two round trips to four and are well-timed departures, complementing Western's nonstop departures and filling important time gaps left by Western's [J.A. 608] services in the market.[131] Continental will offer three classes of service on the B-727-200 equipment it proposes to employ,[132] will bring the carrier's well-known econ-

[130] In addition, it is to be noted that the San Diego-Twin Cities market is a Western monopoly of considerable size (54,197 O&D passengers in fiscal year 1971 according to Western's company records) which historically has received multistop service, with nonstop or onestop service being operated only occasionally. Given strong competition by Continental in the San Diego-Denver market, Western will be subject to severe economic pressure to improve its San Diego-Twin Cities service to onestop frequencies via Denver in order to obtain increased traffic support for its San Diego-Denver nonstop services.

[131] Eastbound, Continental proposes a midday and a close-of-business day departure; westbound, the carrier will offer a morning and a mid-afternoon departure. While under Continental's proposed service pattern, the San Diego-Denver market will be served as a part of a San Diego-Denver-Kansas City through-service in each direction, the record does not establish that the origination or termination of the flights at Kansas City will adversely affect the schedules operated in the prime local San Diego-Denver market or disadvantage existing Denver-Kansas City traffic carried by Continental.

[132] While Continental also proposes to offer five-abreast 3-and-2 seating in the coach and economy classes, it is not necessary to

omy fare to the market, thereby providing cost-conscious passengers with savings of 7.8 percent or $4.63 below existing coach fares,[133] and will introduce various promotional fares not now available in the market, either under the carrier's initial service proposal or as soon as schedules are introduced permitting their use.

Continental's service proposal will substantially benefit the traveling public in five beyond-Denver markets.[134] Thus, the carrier's proposed schedules will provide the San Diego-Kansas City market with first single-plane service, onestop, on two conveniently-timed daily round trips.[135] Kansas City [J.A. 609] is by far San Diego's largest market without single-plane service; likewise, San Diego is Kansas City's largest market lacking single-plane service. In addition,

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rely upon this convenience aspect of Continental's service proposal to justify its choice as nonstop competitor.

[133] The economy fare will also be offered in the beyond-Denver markets which Continental proposes to serve, at fares ranging between 8.7 percent and 13.5 percent below the coach fare in the particular market.

[134] It is also to be noted that, taken together, Continental's and Western's schedules will provide San Diego service for most major Great Plains and Rocky Mountain communities.

[135] Several carriers (Western, TWA, and Air West) contend that the granting of Continental's application for San Diego-Denver nonstop authority and permitting the carrier to provide San Diego-Kansas City single-plane service via Denver, would, as a matter of economic fact, preclude the grant at a later date of applications which have been filed by Western and TWA for San Diego-Kansas City authority (in Docket 23441 and 23484, respectively) and therefore would violate the *Ashbacker Doctrine*. They object to consideration of Continental's proposed services to Kansas City and the related beyond traffic in evaluating Continental's application. The Board rejected these *Ashbacker* arguments in Order 71-7-34, July 7, 1971, and nothing has been advanced in this reopened and remanded proceeding which would warrant or require a different ruling.

while no other beyond-Denver city would receive single-plane service under Continental's proposal, the carrier will offer first single-carrier service in the San Diego-Colorado Springs/Wichita markets [136] and additional single-carrier service in the San Diego-Oklahoma City/Tulsa markets on a connecting basis, which will provide passengers with significant travel time savings. The record indicates that the beyond-benefits of Continental's services will accrue to a fiscal year 1970 total of 54,156 O&D and connecting passengers in the five beyond-markets; that, accepting as reasonable the Bureau's projections of the size of these markets in the forecast years,[137] the five beyond-markets will total 77,090 passengers in 1972; and that, as projected by the Bureau, 42,048 passengers in 1972 and 45,201 passengers in 1973 can be expected to use Continental's proposed services in the five beyond-markets.[138] The following table summarizes the foregoing beyond-market traffic data:

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[136] The San Diego-Wichita and San Diego-Colorado Springs markets in fiscal year 1970 ranked 3rd and 5th, respectively, among San Diego markets not enjoying single-carrier service.

[137] The Bureau adopts Continental's 7.5 percent growth factor from the fiscal 1970 traffic base to the forecast calendar year 1972 in the San Diego-Colorado Springs/Wichita/Oklahoma City/Tulsa markets, and uses a 7.5 percent growth rate rather than Continental's 6.4 percent growth rate for the San Diego-Kansas City market. The bureau reduces Continental's stimulation factor from 100 percent to 50 percent in the San Diego-Kansas City market and from 75 percent to 25 percent in the San Diego-Colorado Springs/Wichita markets, and employs Continental's 15 percent stimulation factor in the remaining two markets.

[138] The Bureau accepts Continental's participation factors of 50 percent in the San Diego-Colorado Springs/Wichita markets and 25 percent in the San Diego-Oklahoma City/Tulsa markets, and uses a 75 percent participation factor in the San Diego-Kansas City market in lieu of Continental's 65 percent share.

[J.A. 610]

Beyond Market	Total Market Fiscal 1970	Total Market Calendar 1970	Continental's Passengers Calendar 1972	Continental's Passengers Calendar 1973
San Diego-Kansas City	24,090	38,846	29,130	31,315
San Diego-Colorado Springs	3,675	4,939	2,470	2,655
San Diego-Wichita	6,315	8,486	4,243	4,561
San Diego-Oklahoma City	11,907	14,720	3,680	3,956
San Diego-Tulsa	8,169	10,099	2,525	2,714
Totals	54,156	77,090	42,048	45,201

Continental's proposed operations in competition with Western will be profitable, and the Bureau's estimates of the operating results are reasonable.[139] Thus, the Bureau projects that Continental will achieve an operating profit of $280,000 in 1972 and $1,305,000 in 1973.[140]

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[139] The Bureau's method of calculating the revenues and expenses of Continental's service proposal follows the technique traditionally employed by the Bureau and consistently accepted by the Board as reasonable. Thus, with reference to Continental's beyond-segment traffic, the Bureau did not limit its revenue and expense forecast to the San Diego-Denver on-segment revenues and expenses, but also took into account the revenues and related passenger service expenses generated over Continental's existing beyond-segments, with no increase in direct operating expenses or items of indirect expense not directly related to passenger service. It is recognized that in Appendix A to its Orders 71-3-135 and 71-4-112 the Board followed a more restricted approach in computing the revenues and expenses of Western's nonstop operations, but it gave no explanation for doing so and cited no precedent for its methodology.

[140] The Bureau observes that Continental would not achieve an operating prefit in 1972 sufficient to cover a full return on investment, but could be expected to do so in 1973. (Likewise, in connection with its forecast of operating results for Western in nonstop competition with Continental, the Bureau predicts that the $417,000 minimum operating profit for 1972 which it projects would permit a full 12 percent return on investment of approximately $3.5 million, and that the $325,000 minimum operating profit projected for 1973 would permit a full return on an investment of about $2.7 million.) It is not necessary to rely upon such consid-

[J.A. 611] These projections are based upon the Bureau's rather than Continental's passenger forecasts for the San Diego-Denver market and Continental's beyond markets,[141] and make allowance for self-diversion.[142] The projections are on the conservative side, considering that they apply a cost escalation factor of 5.8 percent annually, which is the factor employed by Continental and is the highest used by any carrier-applicant.

In choosing between Continental and United for the competitive nonstop award herein, it is recognized that there are a number of carrier-selection considerations favoring the choice of United. United has stations at both San Diego and Denver which are grandfather points on the carrier's system and which the carrier has served since the early 1930's. It has a substantial investment and personnel complement at both San Diego and Denver [143] in support of a

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erations, since the Board in determining whether a route award should be made to a trunkline carrier traditionally does not look beyond the estimated operating profit or loss on a proposed operation. No case has been cited where the Board took into account the sufficiency of the operating profit to cover return on investment, and it is noted that in Appendix A to Order 71-3-135 and Order 71-4-112 where the Board made a financial forecast for Western's San Diego-Denver nonstop operations, it did not consider return on investment.

[141] The Bureau forecasts that Continental will carry a total of 84,229 passengers in 1972 on its proposed services (42,181 San Diego-Denver passengers plus 42,048 beyond-passengers) and 95,584 passengers in 1973 (50,383 San Diego-Denver passengers plus 45,201 beyond passengers). As already indicated, the Bureau predicts that Continental and Western will divide the San Diego-Denver nonstop market 45:55 in 1972 and 50:50 in 1973.

[142] The Bureau estimates self-diversion at $813,000 in 1972 and $863,000 in 1973.

[143] United has city ticket offices at both San Diego and Denver, a total of 3,132 employees (187 at San Diego and 2,945 at Denver), a combined payroll of $41,786,000 ($1,806,000 at San Diego and $39,980,000 at Denver), and gross passenger sales (1970) of $65,410,000 ($20,716,000 at San Diego and $44,694,000 at Denver).

large volume of aircraft operations,[144] and it would appear that the carrier could operate two added daily departures at each point, as it proposes, with little or no added investment or personnel and could therefore achieve an enhanced utilization of its existing ground equipment and increased pro- [J.A. 612] ductivity of its existing personnel complement. United's continuing promotion of Denver over the years is well known, and the record indicates that the carrier conducts extensive advertising of San Diego as a destination area. In addition, United holds authority to operate single-plane service between San Diego and Denver via a compulsory stop at Los Angeles, and participates with Western in the carriage of the traffic moving between San Diego and Denver.

On the other hand, United's service proposal is not as attractive as Continental's since the departure times of United's nonstop flights in each direction would parallel Western's existing nonstop services and would not therefore fill gaps in the incumbent's nonstop service pattern. Further, despite its onestop authorization in the San Diego-Denver market via Los Angeles with the strong local traffic support of the San Diego-Los Angeles and Los Angeles-Denver segments and the substantial backup traffic from its route east of Denver, United has not operated single-plane service in the market for many years; United's share of the San Diego-Denver market has dwindled to less than 10 percent, and far from providing an effective competitive service against Western, United has, for reasons best known to itself, virtually abandoned the market to Western. In these circumstances, there is no assurance that United would operate the caliber of effective nonstop competition in the San Diego-Denver market required by the public convenience and necessity.

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[144] In the year ended September 30, 1971, United had a total of 30,199 scheduled departures at San Diego and Denver, with 4,078 at San Diego and 26,121 at Denver.

Moreover, while United has an extensive east-of-Denver system which would enable the carrier to offer a substantial level of single-plane and single-carrier service between San Diego and online points, the carrier's service proposal limits its first single-plane services to the San Diego-Omaha and San Diego-Milwaukee markets and further contemplates [J.A. 613] only one daily round trip in each market. These are markets in which United under its existing authority could operate single-plane service with one intermediate stop at Los Angeles, but fails to do so.[145] In any event, the first single-plane services under United's proposal would be used by a total of 19,010 passengers in 1972, which is considerably less than the total of 29,130 San Diego-Kansas City passengers who would travel on the first single-plane services under Continental's proposal in the forecast year.

Weighing and balancing all the relevant carrier-selection factors for and against the Continental and United proposals, it is found that the preponderance of these considerations favors the selection of Continental over United for the San Diego-Denver competitive nonstop authorization.[146]

TWA's proposal in this proceeding has a number of carrier-selection factors favorable to the carrier. It has a sta-

[145] Indeed, as Air West notes, the Los Angeles routing would be a much stronger routing than United's proposed route via Denver, since a through-plane service over Los Angeles would provide a greater volume of online local traffic support than a through-plane service via Denver.

[146] The examiner in evaluating the proposals of United and Continental has not taken into account the prospective operating results of the proposals. However, it should be observed that United itself projects that it would suffer an operating loss (after cost escalation) of $255,455 in 1972 and $248,273 in 1973, and that the Bureau forecasts that the carrier would incur operating losses (after cost escalation) of $339,000 and $96,000 in 1972 and 1973, respectively, under the Bureau's traffic forecast for United. United's projection does not make any allowance for self-diversion whereas the Bureau in its estimates excludes self-diverted passengers and revenues.

tion at Denver and has maintained a sales office at San Diego for 25 years. The carrier would match Continental's proposed volume of nonstop service—two daily round trips—in the San Diego-Denver market; has a vast system east of Denver which would put the carrier in a position to operate single-plane and single-carrier services between San Diego and points east of Denver, including points in Europe [J.A. 614] such as Paris and Rome; and proposes to operate first competitive single-plane service between San Diego and St. Louis (two daily onestop round trips) and between San Diego and Cincinnati (one daily twostop round trip), as well as additional single-plane services in the San-Diego Philadelphia and San Diego-Cleveland markets. In addition, as forecast by the Bureau, the carrier would realize an operating profit (after allowance for cost escalation and self-diversion) of $387,000 in 1972 and $1,027,000 in 1973.

Other factors, however, must be weighed in the balance with the foregoing considerations. TWA's proposed pattern of San Diego-Denver nonstop service is not as attractive as Continental's since, except for the proposed mid-day eastbound departure, TWA's schedules do not fill important gaps in Western's nonstop pattern. In beyond-markets, TWA proposes no first single-plane services; the San Diego-Cincinnati/Cleveland/St. Louis markets currently receive single-plane service from American, and the San Diego-Philadelphia market receives such service from American and United.[147] It is also questionable whether TWA would provide the effective nonstop competition which the San

[147] TWA in the original phase of this case proposed to operate single-plane services between San Diego and London via Chicago and between San Diego and London via Friendship and Philadelphia, on a one-daily round trip basis, as well as to offer connections at Kennedy for European points. In this remanded proceeding, however, TWA concedes that the opportunities for first single-plane service between San Diego and Europe via Denver are more limited than via Chicago, New York and Washington, D.C.

Diego-Denver market requires, in light of the carrier's record of not implementing route authority. Of 18 Denver-East markets in which TWA holds authority for single-plane service, it schedules no such service in seven and offers single-plane service only in one direction in another two.

[J.A. 615] Based upon the foregoing considerations, it is concluded that, on balance, Continental should be chosen instead of TWA for the additional San Diego-Denver nonstop award.

As to Air West, there is much to be said for the carrier's proposal. It would almost double the volume of nonstop service in the San Diego-Denver market, as it would add two round trips, one on a daily basis and the second six days per week. The schedules would integrate well, in terms of departure times, with Western's nonstop flights; eastbound, the carrier would offer a midday and an evening service, and westbound, a morning and an early evening service. Air West would provide essentially a turnaround service pattern since the only beyond point it would serve would be Santa Ana approximately 76 miles beyond San Diego.[148] In addition, as a local service carrier, Air West can be expected to have an exceptional incentive to concentrate on the development of the local traffic in the San Diego-Denver market, and to have outstanding flexibility to adjust and tailor its schedules to meet the specific needs of the local traffic. Moreover, the addition of the San Diego-Denver segment to Air West's present system operations would substantially improve the operating characteristics of the carrier's system in terms of major economic indices such as total scheduled service transport revenues and revenue passenger miles, average length of passenger haul, and average length of aircraft hop. Finally, Air West is heavily subsidized, is by far the smallest of the applicants

[148] Santa Ana would receive first single-plane service to Denver on one onestop round trip.

from the standpoint of total system assets, and needs major new routes of substantial length and high traffic density which would strengthen the carrier and reduce its subsidy need.

[J.A. 616] There are, however, a number of considerations militating against selection of Air West in preference to Continental. Air West, which ranks ninth among the nine local service carriers in terms of system operating results,[149] has limited beyond-traffic support for local operations, and lacks market identity at Denver, could hardly be expected to provide strong, effective competition against Western, a robust trunkline carrier which is more deeply entrenched than ever in the San Diego-Denver market since being awarded nonstop authority almost two years ago and which, due to its onestop authority and substantial beyond traffic support for San Diego-Denver operations, would easily be able to outschedule Air West. Moreover, Air West would not provide first single-plane service benefits to as many beyond-passengers as would Continental.[150] The local service carrier's operations would also be limited to a single class of service in a market which, although preponderantly coach, is accustomed to both first-class and coach service, whereas Continental would bring three classes of service, including economy, to the market.

[J.A. 617] Finally, far from providing Air West with an opportunity for route strengthening and subsidy reduction, it is clear that the award of the nonstop segment to Air West

[149] Air West suffered operating losses of $17,484,000 in fiscal 1969, $21,291,000 in fiscal 1970, and $5,333,000 in fiscal 1971.

[150] Continental's total (in the San Diego-Kansas City market) amounts to 29,130 passengers in 1927 and 31,315 in 1973; Air West's beyond-passengers (in the Santa Ana-Denver market) are estimated at 8.448 in 1972 and 8,870 in 1973. Moreover, the latter estimates, even as small as they are, are probably overstated in that they do not take into account the entry of Air California into the Santa Ana-San Diego market.

would materially increase the carrier's subsidy need and further weaken its already weak financial condition.[151]

Based upon a comparative evaluation of the Continental and Air West proposals and weighing and balancing the relevant carrier-selection criteria, it is found that the San Diego-Denver nonstop award should go to Continental rather than Air West.

[J.A. 618] 3. *Restrictions Upon Nonstop Award to Continental.* It is found that no restriction should be attached to the San Diego-Denver nonstop authority awarded to Continental which would prohibit the carrier from providing single-plane service between San Diego, on the one hand, and Kansas City or Chicago, on the other hand. It is the Board's general policy, which requires no citation of decisions, to allow successful carriers in route cases to tack new awards with existing authority so as to enable them to operate single-plane or single-carrier services over the route resulting from the combined authorizations, and the record in this proceeding does not disclose any exceptional circumstances warranting or requiring a departure from this policy. The Board in Order E-26608, April 3, 1968, singled out the San Diego-Kansas City market as one which could gain improved service under a San Diego-Denver nonstop

[151] Air West projects a subsidy need increase of $92,740 in 1972 and a subsidy need reduction of $79,738 in 1973, using Subpart K methods; and forecasts a subsidy reduction of $173,235 in 1972 and $366,430 in 1973, using a modified Subpart K technique. The Bureau, on the other hand, estimates that Air West would suffer a subsidy need increase of $198,000 in 1972 and achieve a subsidy need reduction of $105,000 in 1973. The principal flaw in the forecasts of both Air West and the Bureau is that they are based upon the assumption that Air West, in competition with Western would carry 45 percent of the San Diego-Denver nonstop market. In the examiner's judgment, Air West would, at best, attract not more than one-third of the nonstop market and, as a result, would suffer substantial increases in subsidy need. This is entirely apart from the fact that Air West and the Bureau have made no provision for cost escalation in their projections.

award in this case. As to the San Diego-Chicago market, it is not evident from the record that the addition of Continental as a onestop carrier via Denver will cause meaningful diversion from the incumbent nonstop carriers, United and American. These carriers operate a total of six daily nonstop flights in each direction between San Diego and Chicago, United does not urge a restriction prohibiting single-plane service by Continental in the San Diego-Chicago market, American did not participate in this reopened proceeding, and the *Ashbacker Doctrine* relied upon by Western is not applicable.

[J.A. 619] 4. *Modification of Conditions in Continental's Certificate.* It is found that the modifications of conditions (7), (8), and (9) in Continental's certificate proposed by the carrier [152] should be denied. As pointed out by Western, the proposed amendments were not included in Continental's application, were not the subject of any Board order on consolidation, and were not otherwise placed in issue by the Board. Moreover, the proposed amendments are unrelated to the issue of San Diego-Denver nonstop authority, and none of the conditions would keep Continental from operating the schedules proposed in its exhibits.

[152] Condition (7) provides that Continental shall serve Kansas City and Chicago on the same flight only when the flight originates or terminates at Los Angeles or a point west; Continental would amend the condition so as to allow a flight serving Kansas City and Chicago to originate or terminate at San Diego. Condition (8) prohibits Continental from operating single-plane service on its segment 6 (Chicago-Kansas City-Colorado Springs-Denver-Los Angeles) through Denver or Colorado Springs to or from points south of Colorado Springs; Continental would amend the condition so as to make it clear that Continental can operate single-plane service between San Diego and Chicago via Denver and Kansas City. Condition (9) prohibits Continental from operating single-plane service over segment 6 between Chicago and points south of Kansas City; Continental's proposed amendment would allow operation of single-plane service between San Diego and Chicago via Denver and Kansas City.

5. *Effective Date of Continental's Amended Certificate.* It is found that the amended certificate issued to Continental for unrestricted San Diego-Denver nonstop authority should carry the earliest possible effective date commensurate with the Board's discretionary review and reconsideration procedures, and that the request of the Bureau to delay the effective date of the certificate until January 1, 1973 should be denied. The record establishes that the nonstop operations of Western and Continental in 1972—the first year of operations—will be substantially profitable for each [J.A. 620] carrier, and there is no justification for withholding from the traveling public a service clearly required by the public convenience and necessity and, on this record, long overdue.[153] Entirely apart from the legal questionability of a deferred effective date, Western appears to be in excellent financial health and does not need the additional year's profit bonus which the Bureau advocates. The Board's decision in the Miami-London Route Investigation, Order 69-7-90, served July 18, 1969, which is cited by the Bureau as support for its position, is not in point.

One additional matter warrants comment. It is now apparent that this case will not be finally decided before summer of 1972 and that the first full year of competitive nonstop service, if the award herein to Continental is effectuated, will be 1973. While the record includes traffic and revenue and expense forecasts for 1973 as well as for 1972, this does not preclude a decision based upon 1972 projected results; on the other hand, there is no question but that the employment of projected data for 1973 would re-inforce the conclusions reached herein respecting the profitability of Western's and Continental's San Diego-Denver nonstop operations.

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[153] This case had its origins in Order E-25202, adopted by the Board on May 26, 1967.

Ultimate Conclusions

Upon consideration of the foregoing and all the facts of record, it is concluded:

1. That the public convenience and necessity require the amendment of the certificate of Continental Air Lines, Inc., for route 29 so as to add a new segment extending between the terminal point Denver, Colo., and the terminal point San Diego, Calif.;

[J.A. 621] 2. That Continental Air Lines, Inc., is fit, willing, and able properly to perform the above-described air transportation and to conform to the provisions of the Act and the rules, regulations, and requirements of the Board thereunder.[154]

It is further concluded:

1. That the decision of the Board in Order 70-4-46, April 9, 1970, to the extent that it denied applications of Hughes Air Corp. (Air West), Trans World Airlines, Inc., and United Air Lines, Inc., for certificated nonstop authority between San Diego, Calif., and Denver, Colo., should be affirmed;

2. That, except to the extent granted, the petitions for reconsideration of Order 70-4-46, April 9, 1970, which were deferred in Order 70-6-43, June 5, 1970, should be denied;

3. That this proceeding should be terminated.

License Fee

For the purpose of determining a license fee in accordance with the schedule set forth in section 389.25 of the Board's Organization Regulations (14 C.F.R 3.89.25), it is

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[154] Continental is a long-established certificated air carrier, no party to this proceeding disputes the carrier's fitness, and the record contains no evidence requiring or warranting a finding that the carrier does not possess the requisite fitness.

found that the increase in the annual gross transport revenues of Continental Air Lines, Inc., during the first full year of operations resulting from the new authority granted herein will be over $5 million and under $10 million.

[J.A. 622]

Order and Amended Certificate

Attached hereto are an order and an amended certificate of public convenience and necessity for Continental Air Lines, Inc. (route 29) [185] implementing the ultimate conclusions herein.

/s/ HYMAN GOLDBERG
Hyman Goldberg
Hearing Examiner

February 22, 1972

Attachments

[185] The certificate of Continental Air Lines, Inc., for route 29, which is being amended herein, was issued to the carrier pursuant to Order 70-9-39, September 4, 1970.

APPENDIX 1
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[J.A. 623] SUMMARY OF POSITIONS OF PARTIES

1. *Bureau of Operating Rights:* The San Diego-Denver market requires and can support first competitive nonstop service. However, the Board should delay the effective date of the certificate authorizing operations by a competitive carrier in this market until January 1, 1973.[1] In the event the Board certificates a second nonstop carrier, Continental should be selected for the award. TWA's *Ashbacker* views were specifically rejected by the Board in Order 71-7-34 and should be rejected now; nothing in the present record indicates that the grant of Continental's application for San Diego-Denver nonstop authority in this proceeding would preclude the grant of San Diego-Kansas City nonstop authority to TWA in a subsequent proceeding on the latter's application for such authority.

2. *The Applicant-Carriers*

Air West: [2] Competitive nonstop service should be authorized between San Diego and Denver. Air West should be selected for the award, and the applications of Continental, TWA, and United should be denied. Granting of Continental's application for San Diego-Denver nonstop

[1] The Bureau reserves the right to recommend a different date for the inauguration of competitive service should economic conditions so require.

[2] Air West is a subsidized local service carrier certificated to serve San Diego but not Denver, and holds no operating authority between San Diego and Denver. The carrier seeks the addition to its certificate for route 76 of a new segment extending between the terminal point San Diego and the terminal point Denver. The authority is requested on a permanent basis, but the carrier would accept a temporary certificate. Air West is also willing to accept a subsidy-ineligible authorization.

authority, which would permit the carrier to provide San Diego-Denver-Kansas City service, would, as a matter of economic fact, preclude the granting of Western's or TWA's applications for San Diego-Kansas City authority at a later date and thus violate the *Ashbacker Dostrine.*

Continental:[3] The San Diego-Denver market requires competitive nonstop service. Continental should be selected to compete with Western, and the applications of Air West, TWA, and United should be denied. The *Ashbacker* claims of TWA and Western are without merit, and Continental's proposed modifications of conditions (7), (8), and (9) in its certificate for route 29 are within the issues of this case and should be adopted.

[J.A. 624]

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TWA:[4] There is no immediate need for competitive nonstop service between San Diego and Denver; given the poor economic state of the industry and the relatively recent authorization and institution of nonstop service by Western, the sound approach would be to permit this market to grow and develop before adding a competitor to it. In the event, however, that competition is authorized between San Diego and Denver, TWA should be the carrier selected to provide it. Grant of Continental's application, without an appropriate restriction against single-plane

[3] Continental is certificated to serve Denver, but not San Diego, and holds no operating authority between Denver and San Diego. In its specimen certificate for route 29 in its exhibits, Continental requests the addition of a new segment extending between the terminal point Denver and the terminal point San Diego, together with modifications of conditions (7), (8), and (9) in the existing certificate.

[4] TWA holds certificate authority at Denver, but not at San Diego. In its specimen certificate for route 2 in its exhibits, TWA asks for the addition of a new segment extending between the terminal point San Diego and the terminal point Denver.

service between San Diego and Kansas City via Denver, would economically preclude the grant of TWA's application in Docket 23484 for San Diego-Kansas City nonstop authority which the Board refused to consolidate into this remanded proceeding, and would be unlawful under the *Ashbacker Doctrine.*

United:[5] United remains an applicant for San Diego-Denver nonstop authority in this remanded proceeding as it was in the original case. However, the record developed here appears to support the Board's prior decision that the San Diego-Denver market has not yet developed to the point where it can support competitive nonstop service with full recovery of the total economic cost of the service. Nevertheless, if the Board ultimately determines that the public convenience and necessity require the certification of a second San Diego-Denver nonstop carrier, United should be selected for award of that authority, and all other applications should be denied.

3. *Western:*[6] There is no need for a second nonstop carrier in the San Diego-Denver market, the market cannot support a second nonstop carrier and will not be able to do so in the foreseeable future, and all applications at issue herein should be denied. Further, the Board cannot legally certificate competitive nonstop service in the market since

[5] United is certificated to serve both San Diego and Denver, and has the authority to operate single-plane service between San Diego and Denver via a mandatory stop at Los Angeles, which is the junction point of segments 6 and 7 in the carrier's certificate for route 1. In the event of an award of San Diego-Denver nonstop authority to it, United in its specimen certificate in its exhibits would have the award implemented by adding Denver to segment 11 as an intermediate point between San Diego and Chicago.

[6] Western is the exclusive nonstop carrier in the San Diego-Denver market, having received its nonstop authorization in the original phase of this case.

such a decision would depress Western's load factors below the passenger load factor standard of 55 percent adopted by the Board in Phase 6B of the Domestic Passenger Fare Investigation. Also, Western is an applicant in Docket 23441 for authority to serve Kansas City and Chicago from San Diego via Denver, and absent a prohibition against the provision of single-plane service between San Diego and Kansas City and Chicago, the certification of Continental for San Diego-Denver nonstop service would be a violation of *Ashbacker*. Continental's proposed changes of conditions (7), (8), and (9) set forth in its specimen certificate are beyond the scope of the issues in this case, and in any event no evidence to support the amendments was introduced.

[J.A. 625]

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4. *Frontier:*[1] The San Diego-Denver market does not need a second nonstop carrier at this time. Western should be allowed to further develop the market with its nonstop service, and a later investigation would be appropriate to determine the desirability of placing a second nonstop carrier in the market. If either Continental or United is awarded San Diego-Denver nonstop authority, Frontier would be subjected to significant harmful diversion and its competitive efforts against these two trunklines in related markets would be impeded.

5. *The Civic Parties*

Denver and Colorado Parties: The public convenience and necessity require the authorization of competitive nonstop service in the San Diego-Denver market. Any certificate issued herein should not be delayed, but should become effective upon its issuance.

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[1] Frontier is a subsidized local service carrier which participated in this proceeding under Rule 14 of the Board's Rules of Practice. It is not an applicant for San Diego-Denver nonstop authority.

Kansas City Parties: The public convenience and necessity require the authorization of effective single-plane one-stop service between San Diego and Kansas City via Denver. The Kansas City Parties favor the selection of a carrier which can provide this service. The award of this authority should become effective without delay.

San Diego Parties: The public convenience and necessity require authorization of competitive nonstop service in the San Diego-Denver market.

Wichita: Continental should be awarded nonstop authority between Denver and San Diego, by an extension of segment 4 of the carrier's route 29 from Denver to San Diego. This would enable Continental to operate first one-carrier service between Wichita and San Diego via Denver.

[J.A. 626]

APPENDIX 2
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SAN DIEGO-DENVER MARKET
LOCAL O&D AND CONNECTING PASSENGERS
(CALENDAR 1966-FISCAL 1970)

Market	Item	Total	United Passengers	Western Passengers
1966	Local O&D	33,150	3,990 [1]	27,420
	Connecting	8,900	760 [1]	8,140
	Total	42,050	4,750 [1]	35,560
1967	Local O&D	35,510	4,390	28,860
	Connecting	11,640	860	10,740
	Total	47,150	5,250	39,600
1968	Local O&D	47,620	5,990	37,860
	Connecting	17,070	1,690	15,300
	Total	64,690	7,680	53,160
1969	Local O&D	48,560	6,480	36,750 [2]
	Connecting	20,960	2,230	18,660 [2]
	Total	69,250	8,710	55,410 [2]
F.Y. 1970	Local O&D	50,840	6,720	38,810 [2]
	Connecting	19,590	2,130	17,340 [2]
	Total	70,430	8,850	56,150 [2]

[1] United on strike during this year.

[2] Western on strike during this year.

[J.A. 627]

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SAN DIEGO-DENVER MARKET
SHARES OF LOCAL O&D AND CONNECTING PASSENGERS
CARRIED BY UNITED AND WESTERN [1]

Year	United's Share	Western's Share
1966	11.3% [2]	84.6%
1967	11.1	84.0
1968	11.9	82.2
1969	12.5	79.7 [3]
F.Y. 1970	12.6	79.7 [3]

[1] Shares of United and Western do not add up to 100 percent since passengers moving on multi-carrier routings are included in total market figures.

[2] United on strike during this year.

[3] Western on strike during this year.

[J.A. 628]

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SAN DIEGO-DENVER MARKET
SHARE OF ONLINE PASSENGERS
CARRIED BY WESTERN

Year	Total Online Passengers	Western	
		Online Passengers	Share
Calendar 1967	44,900	39,600	88.2%
Fiscal 1968	54,260	47,770	88.0
Calendar 1968	60,930	53,160	87.2
Fiscal 1969	63,100	55,810	88.4
Calendar 1969 [1]	64,240	55,410	86.3
Fiscal 1970 [1]	65,180	56,150	86.1

[1] Western was on strike during this period.

[J.A. 629]

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SAN DIEGO-DENVER MARKET
BREAKDOWN OF LOCAL O&D PASSENGERS BY QUARTER
MARCH 1968-JUNE 1970

Year and Quarter		Local O&D Passengers
1968:	First Quarter	10,560
	Second Quarter	12,040
	Third Quarter	13,520
	Fourth Quarter	11,770
1969:	First Quarter	9,430
	Second Quarter	11,890
	Third Quarter [1]	12,660
	Fourth Quarter	14,580
1970:	First Quarter	11,510
	Second Quarter	12,090

[1] Western was on strike during this quarter.

[J.A. 630]

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SAN DIEGO-DENVER MARKET
RATIO OF INTERLINE CONNECTING PASSENGERS TO
LOCAL O&D PASSENGERS

Year	Local O&D Passengers	Interline Connecting Passengers	Ratio of Interline Connecting to Local O&D
1966 [1]	33,150	8,900	26.8%
1967	35,510	11,640	32.8
1968	47,620	17,070	35.8
1969 [2]	48,560	20,960	43.2
F.Y. 1970 [2]	50,840	19,590	38.5

[1] United was on strike.
[2] Western was on strike.

[J.A. 631]

APPENDIX 3
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SAN DIEGO-DENVER MARKET
WESTERN'S ONLINE O&D PASSENGERS

Month	1969 First Class	1969 Coach	1969 Total	1970 First Class	1970 Coach	1970 Total	1971 First Class	1971 Coach	1971 Total
January	490	4,566	5,056	233	4,902	5,135	317	5,929	6,246
February	336	4,109	4,445	197	4,325	4,522	245	5,483	5,728
March	349	4,970	5,319	239	5,323	5,562	397	6,418	6,815
April	356	4,900	5,256	223	4,460	4,683	303	6,681	6,984
May	347	4,691	5,038	184	4,860	5,044	283	5,892	6,175
June	335	6,147	6,482	282[2]	6,619[2]	6,901[2]	252	7,503	7,755
July	203[1]	5,372[1]	5,575[1]	313	7,227	7,540	303	7,898	8,201
August	102[1]	2,519[1]	2,621[1]	338	8,443	8,781	369	9,198	9,558
September	196	4,744	4,940	271	6,076	6,347	294	6,353	6,647
October	215	4,613	4,828	237	5,416	5,653	346	5,695	6,041
November	184	4,474	4,658	267	5,711	5,978	N.A.	N.A.	N.A.
December	314	6,156	6,470	383	7,585	7,968	N.A.	N.A.	N.A.
Total	3,427	57,261	60,688	3,167	70,947	74,114	3,109	67,050	70,150

[1] Western was on strike July 29-August 15, 1969.
[2] Western inaugurated nonstop service on June 8, 1970.

[J.A. 632]

APPENDIX 3
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San Diego-Denver Market
Increase in Western's Online O&D Passengers

Month	Percentage Increase in 1970 Over Same Month in 1969			Percentage Increase in 1971 Over Same Month in 1970		
	1969	1970	Percentage Increase	1970	1971	Percentage Increase
January	5,056	5,135	1.5%	5,135	6,246	21.6%
February	4,445	4,522	1.7	4,522	5,728	26.6
March	5,319	5,562	4.6	5,562	6,815	22.5
April	5,256	4,683	(10.9)	4,683	6,984	49.1
May	5,038	5,044	None	5,044	6,175	22.4
June	6,482	6,901[2]	6.5	6,901[2]	7,755	12.4
July	5,575[1]	7,540	35.2	7,540	8,201	8.9
August	2,621[1]	8,781	235.0	8,781	9,558	8.8
September	4,940	6,347	28.5	6,347	6,647	4.7
October	4,828	5,653	14.7	5,653	6,041	6.9
November	4,658	5,978	28.3	5,978	Not available	—
December	6,470	7,968	23.2	7,968	Not available	—

[1] Western was on strike in these months of 1969.

[2] Western inaugurated nonstop service on June 8, 1970.

APPENDIX 3
Page 3 of 3

[J.A. 633] San Diego-Denver Market
Western's Online O&D Passengers

Year and Quarter	Western's Online Passengers Understatement in C.A.B. Surveys			
	As per C.A.B. Surveys	As per Western's Company Records	Number of Passengers	Percentage
1969—1st Q	12,580	14,820	2,240	17.8%
—2nd Q	15,170	16,776	1,606	10.6
—3rd Q	11,060	13,136	2,076	18.8
—4th Q	16,600	15,956	(644)	(3.9)
1970—1st Q	13,040	15,219	2,179	16.7
—2nd Q	15,450	16,628	1,178	7.6
CY 1969	55,410	60,688	5,278	9.5
FY 1970	56,150	60,939	4,789	8.5
Six Quarters	83,900	92,535	8,635	10.3

APPENDIX 4
Page 1 of 1

[J.A. 634] San Diego-Denver Market
Two-Carrier Onestop Connecting Services Daily
(via Los Angeles) 1/ as of December 1, 1971

Carriers	No. of Eastbound Connections Daily	No. of Westbound Connections Daily
Continental/Delta	4	2
Continental/American	4[2]	3
Continental/Western	1	1
United/American	2[3]	1
United/National	—	1

[1] Western/United offered a single onestop connecting service via Las Vegas, eastbound only.

[2] One of these connections was operated only six days a week.

[3] One of these connections was operated only six days a week.

EASTBOUND SCHEDULES

Flight No.	474[1]	476	700	216	603
Equipment	B-720B	B-737	B-727	B-737	B-720B
Service	First/Coach	Coach	First/Coach	Coach	First/Coach
Routing	Los Angeles San Diego (LV. 8:10 A) Denver (AR. 11:05 A) Sioux Falls Twin Cities	San Diego (LV. 9:40 A) Phoenix Denver (AR. 1:35 P) Twin Cities	Vancouver Portland Los Angeles San Diego (LV. 12:55 P) Phoenix Denver (AR. 4:40 P) Twin Cities	Los Angeles San Diego (LV. 3:25 P) Phoenix Denver (AR. 7:20 P) Sioux Falls Twin Cities	Seattle Los Angeles San Diego (LV. 3:50 P) Denver (AR. 6:45 P)

WESTBOUND SCHEDULES

Flight No.	701	543	215	417[2]	425[3]	479
Equipment	B-727	B-720B	B-73	B-737	B-720B	B-737
Service	First/Coach	First/Coach	Coach	Coach	First/Coach	Coach
Routing	Twin Cities Denver (LV. 9:20 A) Phoenix San Diego (AR. 11:09 A) Los Angeles Seattle	Denver (LV. 10:50 A) San Diego (AR. 11:55 A) Portland Vancouver	Twin Cities Sioux Falls Denver (LV. 11:20 A) Phoenix San Diego (AR. 1:24 P) San Francisco Portland	Twin Cities Denver (LV. 5:00 P) San Diego (AR. 6:45 P) Los Angeles	Twin Cities Denver (LV. 6:30 P) San Diego (AR. 7:35 P) Los Angeles	Twin Cities Sioux Falls Denver (LV. 8:00 P) Phoenix San Diego (AR. 9:59 P) Los Angeles San Francisco

[1] Effective December 15, 1971, flight 474 will be operated with a San Diego departure time of 8:05 A, with B-737 aircraft, in all-coach configuration.

[2] Effective December 15, 1971, flight 417 will be operated with a San Diego arrival time of 6:59 P, with B-720 equipment, first-class/coach.

[3] Effective December 15, 1971, flight 425 will be operated with B-727 aircraft, first-class/coach.

WESTERN'S SAN DIEGO-DENVER SCHEDULES
(AS OF DECEMBER 1, 1971)

WESTERN'S SAN DIEGO-DENVER NONSTOP LOAD FACTORS, BY MONTH (JUNE 1970 - OCTOBER 1971)

Month and Year	Reserved Seat Load Factors			Total On-Board Load Factors		
	First Class	Coach	Total	First Class	Coach	Total
June 1970	14.9%	41.7%	38.3%	15.0%	50.0%	45.6%
July	13.0	47.3	43.1	15.9	53.9	49.2
August	16.8	49.2	45.3	18.1	58.8	53.9
September	16.2	33.2	31.3	18.1	40.5	37.8
October	14.6	32.4	29.1	16.5	39.2	36.5
November	17.7	35.6	33.6	17.7	42.9	40.0
December	22.3	49.9	46.7	23.1	55.9	52.1
Total 1970	16.5	41.3	38.4	17.3	48.9	45.2
January 1971	27.8	40.4	39.3	28.5	47.1	45.5
February	28.2	43.0	41.8	30.6	51.2	49.6
March	34.5	45.2	44.3	35.6	53.0	51.6
April	27.7	46.4	45.0	29.2	56.2	54.2
May	25.6	36.7	35.8	26.3	45.9	44.3
June	23.0	47.2	45.1	23.0	58.0	55.3
Total FY 1971	—	—	40.1	—	—	47.6
July	30.9	56.7	54.6	31.8	63.4	60.9
August	35.9	59.0	57.2	35.6	69.6	66.9
September	25.6	45.9	44.1	26.4	55.4	52.7
October	30.2	38.0	37.3	30.2	47.5	45.8

Western's Coach Load Factors on Individual Nonstop Flights, By Month (June 1970 - October 1971)

Month and Year	Reserved Seat Coach Load Factors						Total On-Board Coach Load Factors					
	Flt. 474	Flt. 426	Flt. 421	Flt. 425	Flt. 603	Flt. 543	Flt. 474	Flt. 426	Flt. 421	Flt. 425	Flt. 603	Flt. 543
June 1970	62.1%	32.7%	20.0%	49.9%	—%	—%	74.6%	39.3%	24.1%	59.9%	—%	—%
July	63.2	40.1	23.9	64.1	—	—	72.0	44.7	27.2	73.0	—	—
August	66.6	37.3	26.8	63.4	—	—	79.7	44.6	32.0	75.8	—	—
September	45.3	27.6	15.0	45.6	—	—	55.3	33.6	18.3	55.6	—	—
October	44.7	23.5	13.6	45.8	—	—	54.1	28.4	16.4	55.4	—	—
November	42.5	32.2	16.4	48.6	—	—	51.2	38.8	19.7	58.5	—	—
December	64.5	41.1	35.3	57.2	—	—	72.3	46.1	39.6	64.1	—	—
January 1971	55.1	59.8	63.9	54.4	23.3	18.6	64.2	69.7	74.5	63.4	27.1	21.5
February	56.6	—	—	56.1	32.4	28.6	67.5	—	—	66.9	38.6	34.6
March	64.0	—	—	53.6	35.6	29.0	75.1	—	—	62.9	41.8	34.3
April	61.4	—	—	54.1	39.8	30.7	74.4	—	—	65.6	48.2	38.7
May	49.6	—	—	45.5	29.2	22.1	62.1	—	—	57.0	36.6	28.2
June	66.3	—	—	54.9	36.1	31.5	81.5	—	—	67.5	44.4	41.4
July	75.6	—	—	62.8	45.6	43.1	84.6	—	—	70.3	51.0	50.8
August	74.8	—	—	66.9	47.6	45.0	88.9	—	—	79.5	58.8	55.8
September	52.3	—	—	60.3	39.3	30.0	63.1	—	—	72.7	48.1	37.8
October	41.9	—	—	52.8	35.3	22.0	52.4	—	—	66.0	44.1	27.6

Western's San Diego-Denver Onestop Load Factors, 1970 (By Month and Sector)

Month and Year	Reserved Seat Load Factors						Total On-Board Load Factors					
	San Diego-Phoenix			Phoenix-Denver			San Diego-Phoenix			Phoenix-Denver		
	First Class	Coach	Total	First Class	Coach	Total	First Class	Coach	Total	First Class	Coach	Total
January 1970	37.7%	44.1%	43.7%	48.4%	60.1%	59.1%	37.7%	52.6%	51.6%	48.5%	64.3%	63.0%
February	36.8	42.8	42.5	45.3	60.3	59.0	38.2	52.3	51.4	45.7	67.0	65.2
March	35.5	49.2	48.1	49.1	68.0	66.4	36.7	58.4	56.7	50.2	73.9	71.9
April	27.8	38.4	37.5	42.3	53.1	52.2	27.8	46.8	45.2	42.6	60.3	58.9
May	20.6	39.2	37.6	37.6	56.0	54.8	23.2	47.8	45.7	39.0	64.5	62.8
June	20.7	47.7	45.3	38.2	70.2	68.2	24.0	57.0	54.1	41.1	79.7	77.2
July	23.9	52.9	50.3	35.2	69.2	67.0	24.5	62.5	59.1	37.0	76.8	74.2
August	30.0	55.1	53.1	35.6	73.0	70.9	32.3	66.9	64.2	36.3	82.9	80.3
September	25.2	42.3	41.0	36.0	60.5	59.1	26.7	52.7	50.8	36.6	69.0	67.2
October	24.8	45.4	44.0	46.3	60.0	59.3	25.5	54.8	52.8	46.3	66.2	65.2
November	25.6	50.3	48.7	51.5	66.5	65.7	25.6	57.1	55.0	51.5	73.6	72.4
December	30.6	55.7	43.5	47.9	73.5	72.4	32.0	62.7	60.6	48.8	78.3	77.0
Total 1970	27.9	46.5	37.4	43.6	63.7	62.4	29.2	55.6	53.6	44.4	70.7	68.9

APPENDIX 6
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WESTERN'S SAN DIEGO-DENVER ONESTOP LOAD FACTORS, 1971
EASTBOUND FLIGHTS, BY MONTH, FLIGHT, AND SECTOR

Month and Year	Flight No.	Reserved Seat Load Factors						Total On-Board Load Factors					
		San Diego-Phoenix			Phoenix-Denver			San Diego-Phoenix			Phoenix-Denver		
		First	Coach	Total	First	Coach	Total	First	Coach	Total	First	Coach	Total
January 1971	476	—%	54.9%	54.9%	—%	77.8%	77.8%	—%	63.3%	63.3%	—%	83.9%	83.9%
	700	56.7	61.3	60.4	59.4	73.5	71.9	57.7	70.7	69.4	59.4	79.3	77.3
	216	—	46.3	46.3	—	64.2	64.2	—	53.4	53.4	—	69.3	69.3
February	476	—	47.3	47.3	—	78.7	78.7	—	53.6	53.6	—	84.0	84.0
	700	59.8	65.5	64.5	70.1	81.3	80.8	59.8	74.2	72.7	70.1	86.8	85.1
	216	—	49.3	49.3	—	66.2	66.2	—	55.8	55.8	—	70.7	70.7
March	476	—	57.0	57.0	—	83.8	83.8	—	66.1	66.1	—	91.5	91.5
	700	58.4	68.7	67.2	76.1	83.9	83.1	62.9	79.7	77.8	78.1	91.6	90.3
	216	—	50.3	50.3	—	71.8	71.8	—	58.4	58.4	—	78.4	78.4
April	476	—	50.1	50.1	—	79.1	79.1	—	58.2	58.2	—	89.7	89.7
	700	62.4	70.7	69.8	85.9	85.2	85.3	70.3	82.1	81.0	88.7	96.6	95.8
	216	—	54.5	54.5	—	70.5	70.5	—	63.3	63.3	—	79.9	79.9
May	476	—	42.4	42.4	—	60.2	60.2	—	50.4	50.4	—	68.7	68.7
	700	40.7	60.4	58.1	55.2	72.4	70.5	41.9	71.8	68.8	56.2	82.6	80.0
	216	—	45.7	45.7	—	63.1	63.1	—	54.3	54.3	—	71.9	71.9
June	476	—	50.8	50.8	—	70.7	70.7	—	61.2	61.2	—	81.3	81.3
	700	38.9	65.6	62.8	49.9	76.0	73.1	43.6	79.0	75.6	51.9	87.3	83.8
	216	—	42.2	42.2	—	63.9	63.9	—	50.9	50.9	—	73.5	72.5
July	476	—	54.6	54.6	—	69.8	69.8	—	63.0	63.0	—	79.0	79.0
	700	35.4	61.5	61.4	41.1	68.3	65.5	35.4	74.5	70.7	41.1	77.3	73.8
	216	—	43.6	43.6	—	56.8	56.8	—	50.3	50.3	—	64.2	64.2
August	476	—	65.4	65.4	—	78.8	78.8	—	77.8	77.8	—	87.5	87.5
	700	55.8	73.3	71.2	55.0	74.3	72.1	58.9	87.2	84.4	55.8	82.5	79.9
	216	—	47.0	47.0	—	64.3	64.3	—	55.9	55.9	—	71.4	71.4
September	476	—	44.9	44.9	—	71.0	71.0	—	54.2	54.2	—	76.9	76.9
	700	50.2	68.1	65.9	51.7	65.1	63.5	51.4	82.1	79.0	51.7	70.5	68.6
	216	—	37.2	37.2	—	58.5	58.5	—	45.2	45.2	—	63.4	63.4
October	476	—	40.6	40.6	—	71.9	71.9	—	49.5	49.5	—	81.7	81.7
	700	56.9	65.3	64.1	67.1	64.9	64.7	57.5	79.5	77.4	67.1	73.8	73.1
	216	—	39.9	39.9	—	57.5	57.5	—	48.6	48.6	—	65.3	65.3

APPENDIX 6
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WESTERN'S SAN DIEGO-DENVER ONESTOP LOAD FACTORS, 1971
WESTBOUND FLIGHTS, BY MONTH, FLIGHT, AND SECTOR

Month and Year	Flight No.	Reserved Seat Load Factors						Total On-Board Load Factors					
		Denver-Phoenix			Phoenix-San Diego			Denver-Phoenix			Phoenix-San Diego		
		First	Coach	Total	First	Coach	Total	First	Coach	Total	First	Coach	Total
January 1971	701	64.4%	74.7%	73.5%	39.3%	45.9%	45.0%	64.4%	80.6%	79.0%	40.0%	53.0%	51.7%
	215	—	86.7	86.7	—	66.1	66.1	—	93.5	93.5	—	76.2	76.2
	417	—	74.5	74.5	—	73.6	73.6	—	80.4	80.4	—	84.9	84.9
	479	—	75.8	75.8	—	59.9	59.9	—	81.8	81.8	—	69.1	69.1
February	701	83.7	85.0	84.6	31.8	35.4	34.8	83.7	90.7	90.0	31.8	40.1	39.2
	215	—	89.7	89.7	—	65.1	65.1	—	95.7	95.7	—	73.7	73.7
	417	—	79.0	79.0	—	75.8	75.8	—	84.3	84.3	—	85.9	85.9
	479	—	75.2	75.2	—	56.0	56.0	—	80.3	80.3	—	63.4	63.4
March	701	70.5	77.3	76.5	33.6	38.4	37.8	72.3	84.4	83.2	36.2	44.6	43.8
	215	—	86.8	86.8	—	65.1	65.1	—	94.8	94.8	—	75.5	75.5
	417	—	71.0	71.0	—	76.9	76.9	—	77.5	77.5	—	89.2	89.2
	479	—	66.2	66.2	—	49.1	49.1	—	72.3	72.3	—	57.0	57.0
April	701	69.0	68.8	68.9	25.1	39.5	38.1	71.2	78.0	77.3	28.3	45.9	44.2
	215	—	78.4	78.4	—	65.1	65.1	—	88.9	88.9	—	75.6	75.6
	417	—	67.9	67.9	—	74.2	74.2	—	77.0	77.0	—	86.2	86.2
	479	—	62.2	62.2	—	51.7	51.7	—	70.5	70.5	—	60.0	60.0
May	701	44.1	56.4	55.0	18.8	33.6	32.1	44.9	64.3	62.4	19.4	40.0	38.0
	215	—	62.1	62.1	—	51.0	51.0	—	70.8	70.8	—	60.7	60.7
	417	—	62.7	62.7	—	71.5	71.5	—	71.5	71.5	—	85.0	85.0
	479	—	53.2	53.2	—	55.9	55.9	—	60.7	60.7	—	66.5	66.5
June	701	43.6	59.0	57.2	21.8	35.0	33.7	45.3	67.8	65.6	24.4	42.2	40.5
	215	—	70.0	70.0	—	56.4	56.4	—	80.5	80.5	—	68.0	68.0
	417	—	71.6	71.6	—	73.7	73.7	—	82.3	82.3	—	88.8	88.8
	479	—	65.4	65.4	—	60.5	60.5	—	75.2	75.2	—	72.9	72.9
July	701	40.2	57.5	55.5	14.4	39.9	37.3	40.2	65.0	62.6	14.2	46.1	43.0
	215	—	71.3	71.3	—	61.3	61.3	—	80.7	80.7	—	70.8	70.8
	417	—	69.0	69.0	—	74.3	74.3	—	78.0	78.0	—	85.8	85.8
	479	—	70.8	70.8	—	67.8	67.8	—	80.1	80.1	—	78.3	78.3
August	701	36.6	60.2	57.7	21.9	35.7	33.8	37.1	66.8	63.9	23.1	42.5	40.1
	215	—	78.2	78.2	—	61.1	61.1	—	86.8	86.8	—	72.7	72.7
	417	—	74.8	74.8	—	71.4	71.4	—	83.0	83.0	—	84.9	84.9
	479	—	74.4	74.4	—	68.4	68.4	—	82.6	82.6	—	81.3	81.3
September	701	44.2	55.1	53.9	27.2	29.4	29.0	44.2	59.7	58.2	27.8	35.5	34.8
	215	—	64.5	64.5	—	49.5	49.5	—	69.9	69.9	—	59.7	59.7
	417	54.8	72.4	70.9	40.4	65.1	59.2	54.8	78.4	76.6	41.3	78.5	75.8
	479	—	68.4	68.4	—	58.9	58.9	—	74.1	74.1	—	71.0	71.0
October	701	59.0	52.5	52.8	18.2	29.3	28.2	59.0	59.7	59.7	18.4	35.7	34.0
	215	—	65.0	65.0	—	44.7	44.7	—	73.9	73.9	—	54.4	54.4
	417	62.4	66.0	65.3	49.0	61.7	60.1	62.4	75.0	73.8	49.5	75.2	72.6
	479	—	65.6	65.6	—	60.6	60.6	—	74.6	74.6	—	73.8	73.8

[J.A. 641]

APPENDIX 7
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WESTERN'S SAN DIEGO-DENVER NONSTOP SEATS FLOWN AND UNUSED

Month and Year	Total Nonstop Seats Flown	Empty Nonstop Seats Flown Daily	
		Without Standby Traffic	With Standby Traffic
June 1970	10,095	271	N.A.
July	13,810	253	226
August	13,690	242	204
September	12,976	297	269
October	13,571	310	278
November	12,738	282	255
December	13,690	235	212
January 1971	14,012	274	246
February	12,655	263	228
March	14,381	258	225
April	13,190	242	201
May	13,798	286	248
June	13,702	251	204
July	13,786	202	N.A.

[J.A. 642]

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Issued under delegated authority

Docket 18104 *et al.*

REMANDED ADDITIONAL SERVICE TO SAN DIEGO CASE
(SAN DIEGO-DENVER)

Order

A full public hearing having been held in the above-entitled proceeding and the examiner, upon consideration of the record, having issued a supplemental initial decision containing his findings and conclusions, pursuant to authority delegated to hearing examiners under Rule 27 of the Board's Rules of Practice in Economic Proceedings, which supplemental initial decision is attached hereto and made a part hereof;

IT IS ORDERED:

1. That an amended certificate of public convenience and necessity in the form attached hereto be issued to Continental Air Lines, Inc., for route 29;

2. That said certificate shall be signed on behalf of the Board by its Secretary, shall have affixed thereto the seal of the Board, and shall be effective upon the effective date of this order: *Provided,* however, That the effective date of said certificate shall be automatically postponed until further Board order if the appropriate license fee is not paid pursuant to section 389.21(b) of the Board's Economic Regulations;

3. That, except to the extent granted, all petitions for reconsideration of Order 70-4-46, April 9, 1970, which were

deferred in Order 70-6-43, June 5, 1970, be and they hereby are denied;

4. That the decision of the Board in Order 70-4-46, April 9, 1970, to the extent that it denied applications of Hughes Air Corp. (Air West), Trans World Airlines, Inc., and United Air Lines, Inc., for certificated nonstop authority between San Diego, Calif., and Denver, Colo., be and it hereby is affirmed;

5. That (a) the motion of Western Air Lines, Inc., docketed January 10, 1972, for leave to file an otherwise unauthorized document, and (b) the motion of Continental Air Lines, Inc., docketed December 13, 1971, to strike, be and they hereby are granted;

[J.A. 643]

6. That, except to the extent granted, all requests involved herein be and they hereby are denied;

7. That this proceeding be and it hereby is terminated;

8. That this order shall become effective as the final order of the Board on the 31st day after the date of service of this order and the supplemental initial decision attached hereto unless a petition for discretionary review is filed within 21 days after service hereof in accordance with Rule 28 of the Board's Rules of Practice in Economic Proceedings (14 CFR 302.28) or the Board issues an order to review upon its own initiative. If a petition for discretionary review is timely filed or if action to review is taken by the Board upon its own initiative, the effectiveness of this order shall be stayed until further order of the Board.

/s/ Hyman Goldberg
HYMAN GOLDBERG
Hearing Examiner

[J.A. 644]

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY
(as amended)

for Route 29

CONTINENTAL AIR LINES, INC.

is hereby authorized, subject to the provisions hereinafter set forth, the provisions of Title IV of the Federal Aviation Act of 1958, and the orders, rules, and regulations issued thereunder, to engage in air transportation with respect to persons, property, and mail, as follows:

1. Between the terminal point Denver, Colo., the intermediate points Colorado Springs, Colo., and Albuquerque, N. Mex., and (a) beyond Albuquerque, the terminal point El Paso, Tex., and (b) beyond Albuquerque, the intermediate point Midland-Odessa, Tex. (to be served through Midland Air Terminal), and the terminal point San Antonio, Tex.;

2. Between the terminal point El Paso, Tex., the intermediate point Midland-Odessa, Tex. (to be served through Midland Air Terminal), and (a) beyond Midland-Odessa, the terminal point San Antonio, Tex., and (b) beyond Midland-Odessa, the intermediate point Fort Worth, Tex., and the terminal point Dallas, Tex.;

3. Between the terminal point Tulsa, Okla., the intermediate points Oklahoma City and Lawton-Fort Sill, Okla., and Wichita Falls and Lubbock, Tex., and (a) beyond Lubbock, the intermediate point Midland-Odessa, Tex. (to be served through Midland Air Terminal), and the terminal point El Paso, Tex., and (b) beyond Lubbock, the terminal point Albuquerque, N. Mex.;

4. Between the terminal point Denver, Colo., the intermediate point Colorado Springs, Colo., and (a) beyond Colorado Springs, the terminal point Kansas City, Mo., and (b) beyond Colorado Springs, the intermediate point Wichita, Kans., and the terminal point Tulsa, Okla.;

5. Between the terminal point Tulsa, Okla., and the terminal point Kansas City, Mo.;

[J.A. 645] 6. Between the terminal point Chicago, Ill., and intermediate points Kansas City, Mo., and Colorado Springs and Denver, Colo., and the terminal point Los Angeles-Ontario, Calif.;

7. Between the terminal point Dallas, Tex., the intermediate points Fort Worth and Lubbock, Tex., and the terminal point Albuquerque, N. Mex.;

8. Between the terminal point Houston, Tex., the alternate intermediate points (a) San Antonio, Tex., or (b) Austin and Midland-Odessa, Tex. (to be served through Midland Air Terminal), the intermediate points El Paso, Tex., and Tucson and Phoenix, Ariz., and the terminal point Los Angeles-Ontario-Long Beach, Calif.;

9. Between the terminal point Amarillo, Tex., the intermediate point Lubbock, Tex., and (a) beyond Lubbock, the terminal point Midland-Odessa, Tex. (to be served through Midland Air Terminal), and (b) beyond Lubbock, the intermediate point Fort Worth, Tex., and the terminal point Dallas, Tex.;

10. Between the terminal point Midland-Odessa, Tex. (to be served through Midland Air Terminal), and the terminal point Houston, Tex.;

11. Between the coterminal points New Orleans, La., and Houston, Tex., the intermediate points Oklahoma City and Tulsa, Okla., Wichita, Kans., and Denver, Colo., and the coterminal points Portland, Oreg., and Seattle-Tacoma, Wash.;

12. Between the terminal point Dallas-Fort Worth, Tex., the intermediate point Wichita, Kans., and the coterminal points Portland, Oreg., and Seattle-Tacoma, Wash.;

13. Between the coterminal points Chicago, Ill., Kansas City, Mo., Denver, Colo., Phoenix, Ariz., Los Angeles-Ontario-Long Beach, Calif., Portland, Oreg., and Seattle-Tacoma, Wash., the intermediate point Hilo, Hawaii, and the terminal point Honolulu, Hawaii;

14. Between the terminal point Albuquerque, N. Mex., and the terminal point Chicago, Ill.;

15. Between the terminal point Albuquerque, N. Mex., and the terminal point San Francisco-Oakland, Calif.;

16. Between the terminal point Dallas-Fort Worth, Tex., and the terminal point Los Angeles-Ontario-Long Beach, Calif.;

[J.A. 646] 17. Between the terminal point Seattle-Tacoma, Wash., the intermediate points Portland, Oreg., and San Francisco-Oakland-San Jose, Calif. (to be served through the Metropolitan Oakland International Airport and the San Jose Municipal Airport), and the terminal point Los Angeles-Ontario-Long Beach-Hollywood-Burbank-Santa Ana-Orange County, Calif. (to be served through the Ontario International Airport, the Long Beach Municipal Airport, the Hollywood-Burbank Airport, and the Orange County Airport);

18. Between the terminal point Denver, Colo., and the terminal point San Diego, Calif.

The service herein authorized is subject to the following terms, conditions, and limitations:

(1) The holder shall render service to and from each of the points named herein, except as temporary suspensions of service may be authorized by the Board; and may begin or terminate, or begin and terminate, trips at points short of terminal points.

(2) The holder may continue to serve regularly any point named herein through the airport last regularly used by the holder to serve such point prior to the effective date of this certificate; and may continue to maintain regularly scheduled nonstop service between any two points not consecutively named herein if nonstop service was regularly scheduled by the holder between such points prior to the effective date of this certificate. Upon compliance with such procedure relating thereto as may be prescribed by the Board, the holder may, in addition to the service hereinabove expressly prescribed, regularly serve a point named herein, other than a point required to be served through an airport or airports named herein, through any airport convenient thereto, and render scheduled nonstop service between any two points not consecutively named herein between which service is authorized hereby.

(3) On flights serving El Paso, Tex., on the one hand, and Oklahoma City and/or Tulsa, Okla., on the other hand, the holder shall stop at one intermediate point other than Oklahoma City between the said points.

(4) The holder shall stop at Albuquerque, N. Mex., or a point south thereof, on flights serving both San Antonio, Tex., and Denver, Colo.

(5) On flights serving both Albuquerque, N. Mex., and Kansas City, Mo., via Colorado Springs, Colo., the holder shall stop at one additional intermediate point between the said points.

(6) All flights between the terminals on segment 5 scheduled by the holder shall originate or terminate at Albuquerque, N. Mex., or El Paso, Tex.

[J.A. 647] (7) The holder shall serve Kansas City, Mo., and Chicago, Ill., on the same flight only when such flight originates or terminates at Los Angeles-Ontario-Long Beach, Calif., or a point west thereof.

(8) On flights serving segment 6, the holder shall not operate single-plane service through Denver or Colorado Springs, Colo., to or from points south of Colorado Springs.

(9) The holder shall not operate single-plane service over segment 6 between Chicago, Ill., on the one hand, and points south of Kansas City, Mo., on the other hand (other than points on segment 6).

(10) The holder shall not operate single-plane service between Denver, Colo., on the one hand, and Fort Worth or Dallas, Tex., on the other hand.

(11) Flights on segment 8 scheduled to serve Phoenix and/or Tucson, Ariz., shall also serve Houston or Austin, Tex.

(12) The holder shall not schedule flights over segment 8 which originate at one point in Texas and terminate at any other point in Texas.

(13) Flights on segment 8 serving Midland-Odessa, Tex., must serve Austin or El Paso, Tex.

(14) The holder shall not schedule single-plane service between Los Angeles-Ontario-Long Beach, Calif., on the one hand, and Dallas or Fort Worth, Tex., on the other hand, except over segment 16.

(15) The holder shall not engage in air transportation (a) between Albuquerque, N. Mex., and Phoenix, Ariz., or (b) between Albuquerque and Tucson, Ariz.

(16) The holder shall not (except on segment 13) schedule single-plane service through the Ontario airport between Los Angeles-Ontario-Long Beach, Calif., and Phoenix or Tucson, Ariz.

(17) Flights on segment 11 or 12 (a) shall (other than nonstop flights between New Orleans, La., and Denver, Colo.) serve Portland, Oreg., or Seattle-Tacoma, Wash., and (b) shall not serve Chicago, Ill., Los Angeles-Ontario-Long Beach, Calif., or Kansas City, Mo.

(18) Flights on segment 11 (a) shall serve New Orleans, La., Houston, Tex., or Denver, Colo., and (b) shall not serve Dallas-Fort Worth or San Antonio, Tex.

(19) Flights on segment 12(a) shall serve Dallas-Fort Worth, Tex., and (b) shall not serve Denver, Colo.

[J.A. 648] (20) The authority granted in segment 13 is limited to the carriage of persons, property, and mail having a point of origin, destination, stopover, or transit in the State of Hawaii. Pursuant to such authority, the holder may grant stopover privileges at any coterminal on the United States mainland named in said segment to passengers moving to or from a point in the State of Hawaii.

(21) On flights serving both Honolulu and Hilo, Hawaii, the holder shall not deplane at one of said points persons, property, or mail enplaned at the other.

(22) The holder's authority to serve Hilo, Hawaii, shall be contingent upon its filing and keeping on file with the Board tariffs providing for common fares for persons and their accompanied baggage to and from all points in the State of Hawaii receiving service from a certificated air carrier, for all classes of service which the holder offers, and further providing for stopovers without charge or at nominal charge at the points of entry into and departure from the State of Hawaii and at intermediate points between such points of entry and departure and the ultimate point of origin or destination in the State of Hawaii and at intermediate points between such points of entry and departure and the ultimate point of origin or destination in the State of Hawaii, subject to such terms, conditions, and limitations as may be agreed upon by and between the holder and the certificated air carriers serving points in the State of Hawaii other than Honolulu and Hilo and are approved by the Board: *Provided, however,* That in the event of a disagreement between the holder and such carriers as to the terms, conditions, and limitations applicable to such common fares

(including the divisions thereof), this condition shall be deemed to be satisfied if the holder offers to enter into an agreement concerning such common fares which the Board determines to be reasonable.

(23) Flights on segment 16 shall not serve Hilo or Honolulu, Hawaii.

(24) Flights on segment 17 shall serve both a point within and a point outside of California named on said segment.

The exercise of the privileges granted by this certificate shall be subject to such other reasonable terms, conditions, and limitations required by the public interest as may from time to time be prescribed by the Board.

This certificate shall be effective on ; *Provided, however,* That the effective date of said certificate shall be automatically postponed until further Board order if the appropriate license fee is not paid pursuant to section 389.21(b) of the Regulations.

IN WITNESS WHEREOF, the Civil Aeronautics Board has caused this certificate to be executed by the Secretary of the Board, and the seal of the Board to be affixed hereto, on the

Secretary

(SEAL)

[J.A. 649] WESTERN AIRLINES

Docket No. 18104
Exhibit No. WA-2
Page No. 1 of 4

WESTERN'S SAN DIEGO-DENVER
ONLINE O&D PASSENGERS

(Response to Information Request 2b.)

1969

	First Class	Coach	Total
January	490	4,566	5,056
February	336	4,109	4,445
March	349	4,970	5,319
April	356	4,900	5,256
May	347	4,691	5,038
June	335	6,147	6,482
July*	203	5,372	5,575
August*	102	2,519	2,621
September	196	4,744	4,940
October	215	4,613	4,828
November	184	4,474	4,658
December	314	6,156	6,470
Year Total	3,427	57,261	60,688

* Western's operations suspended July 29-August 15, 1969 due to a strike.

[J.A. 650] WESTERN AIRLINES

Docket No. 18104
Exhibit No. WA-2
Page No. 2 of 4

WESTERN'S SAN DIEGO-DENVER
ONLINE O&D PASSENGERS

1970

	First Class	Coach	Total
January	233	4,902	5,135
February	197	4,325	4,522
March	239	5,323	5,562
April	223	4,460	4,683
May	184	4,860	5,044
June	282	6,619	6,901
July	313	7,227	7,540
August	338	8,443	8,781
September	271	6,076	6,347
October	237	5,416	5,653
November	267	5,711	5,978
December	383	7,585	7,968
Year Total	3,167	70,947	74,114

[J.A. 651] WESTERN AIRLINES

Docket No. 18104
Exhibit No. WA-2
Page 3 of 4 (5th Rev.)

WESTERN'S SAN DIEGO-DENVER
ONLINE O&D PASSENGERS

1971

	First Class	Coach	Total
January	317	5,929	6,246
February	245	5,483	5,727
March	397	6,418	6,815
April	303	6,681	6,984
May	283	5,892	6,175
June	252	7,503	7,755
July	303	7,898	8,201
August	360	9,198	9,558
September	294	6,353	6,647
October	346	5,695	6,041
November	373	5,957	6,330
December*	408	8,635	9,043
Total	3,881	81,641	85,522

* Includes 379 passengers carried on charter flights and extra-sections in conjunction with the Denver Broncos-San Diego Chargers game on December 12, 1971.

[J.A. 652] WESTERN AIRLINES

APPENDIX A
Page No. 1 of 1

WESTERN'S SAN DIEGO-DENVER
ONLINE O&D PASSENGERS

1972

	First Class	Coach	Total
January	432	6,760	7,192
February	346	6,252	6,598
March*	515	7,591	8,106
April	379	6,584	6,963
May	363	6,620	6,983
June	437	8,807	9,244
July	545	10,126	10,671
August	604	11,567	12,171
September	545	8,584	9,129
October	541	8,357	8,898
November	516	8,275	8,791

Note: Northwest Airlines operations suspended June 30-October 2, 1972 due to a strike.

* Denotes the month in which most of Western's 1972 Easter traffic was carried.

Source: Western Airlines' company records.

[J.A. 653] WESTERN AIRLINES

March 8, 1973

Civil Aeronautics Board
1825 Connecticut Avenue, N.W.
Washington, D.C. 24028

Re: Remanded Additional Service to San Diego Case
(San Diego-Denver)
Docket No. 18104, et al.

Attention: Docket Section

Gentlemen:

Transmitted herewith is the data requested by Continental in its supplemental motion of February 27, 1973, for the month of December 1972. Data for January 1973, will be supplied when it becomes available, which is expected to be in approximately two weeks. The data is supplied subject to the objections to its use set forth in Western's answer herein dated December 29, 1972, and its consolidated answer to petitions for reconsideration dated February 8, 1973.

Yours very truly,

/s/ W. JEFFREY TERRILL
W. Jeffrey Terrill
Manager
Route Proceedings

cc: All Parties

[J.A. 654] WESTERN AIR LINES, INC.

Dec. 1972

SAN-DEN NONSTOP LOAD FACTORS

	Load Factor [1]			Load Factor [2]		
	First	Coach	Total	First	Coach	Total
214	35.8%	65.2%	62.3%	34.1%	59.1%	56.7%
603	37.4	55.7	53.8	35.6	50.5	49.0
424	57.5	81.4	79.0	54.8	73.8	71.9
425	35.8	58.3	56.1	34.1	52.9	51.1
543	41.7	59.9	58.1	39.7	54.3	52.9
423	45.6	73.1	70.4	43.5	66.3	64.1
Total	42.6%	65.9%	63.6%	40.6%	59.8%	57.9%

SAN-DEN ONE-STOP FLIGHTS

	Load Factor [1]			Load Factor [2]		
EASTBOUND	First	Coach	Total	First	Coach	Total
SAN-PHX						
476	—	31.9%	31.9%	—	29.4%	29.4%
700	58.3%	70.6	69.4	57.3%	65.1	64.1
216	—	75.9	75.9	—	70.0	70.0
PHX-DEN						
476	—	85.8%	85.8%	—	82.6%	82.6%
700	64.0%	67.4	67.1	64.0%	64.9	64.7
216	—	82.4	82.4	—	79.4	79.4
WESTBOUND						
DEN-PHX						
701	61.9%	67.8%	67.3%	61.9%	65.3%	64.9%
215	—	82.2	82.2	—	79.2	79.2
417	79.2	79.2	79.2	79.2	76.3	76.3
479	—	88.2	88.2	—	84.9	84.9
PHX-SAN						
701	28.3%	44.2%	42.7%	28.4%	40.8%	37.5%
215	—	55.7	55.7	—	51.4	51.4
417	43.5	64.1	62.2	42.7	59.1	57.5
479	—	66.6	66.2	—	61.0	61.0

Dec. 1972

SAN-DEN ONLINE O&D PSGRS.

First	Coach	Total
721	10511	11232

SAN-MSP NONSTOP FLIGHTS

Total On-Board Psgrs.	Load Factor[2] First	Coach	Total
3,019	22.3%	40.4%	38.7%

[1] Includes standby traffic.

[2] Standby traffic not included.

Source: WA's company records.

March 27, 1973

Civil Aeronautics Board
1825 Connecticut Avenue, N.W.
Washington, D.C. 20428

Re: Remanded Additional Service to San Diego Case
(San Diego-Denver)

Attention: Docket Section

Gentlemen:

Transmitted herewith is the data requested by Continental in its supplemental motion of February 27, 1973, for the month of January 1973. The data is supplied subject to the objections set forth in Western's answer herein dated December 29, 1972, and its consolidated answer to petitions for reconsideration dated February 8, 1973.

Yours very truly,

/s/ W. JEFFREY TERRILL
W. Jeffrey Terrill
Manager
Route Proceedings

cc: All Parties

[J.A. 657] Page 1 of 2

WESTERN AIR LINES, INC.

Jan. 1973

SAN-DEN NONSTOPS

	Load Factor [1]			Load Factor [2]		
	F	4	Total	F	4	Total
214	28.2%	59.1%	56.1%	28.2%	52.7%	50.5%
603	40.3	51.2	50.1	40.3	45.7	45.1
424	39.0	65.8	63.1	39.0	58.7	56.8
425	36.8	54.0	52.2	36.8	48.2	47.0
543	40.3	48.2	47.4	40.3	43.0	42.7
423	44.4	68.7	66.3	44.4	61.3	59.7
Total	38.1%	57.8%	55.8%	38.1%	51.6%	50.2%

SAN-DEN ONE-STOPS
SAN-PHX

	Load Factor [1]			Load Factor [2]		
EASTBOUND	F	4	Total	F	4	Total
476	—	41.0%	41.0%	—	36.5%	36.5%
700	58.9%	71.6	70.4	58.1%	63.7	62.9
216	—	72.7	72.7	—	64.7	64.7
PHX-DEN						
476	—	85.4	85.4	—	80.5	80.5
700	65.6	80.1	78.7	65.6	75.5	74.5
216	—	71.9	71.9	—	67.8	67.8
WESTBOUND						
DEN-PHX						
701	56.7	66.3	65.4	56.7	62.5	61.9
215	—	93.7	93.7	—	88.4	88.4
417	—	72.8	72.8	—	68.7	65.7
479	—	86.3	86.3	—	81.4	81.4
PHX-SAN						
701	56.4	63.5	62.8	55.6	56.5	56.1
215	—	71.0	71.0	—	63.2	63.2
417	—	73.0	73.0	—	65.0	65.0
479	—	57.6	57.6	—	51.3	51.3

[J.A. 658] WESTERN AIR LINES, INC.

Jan. '73

Pg. 2 of 2

SAN-DEN ONLINE O&D

F	4	Total
679	8925	9604

SAN-DEN NONSTOPS

Total On-Board Psgrs.	Load Factor [2] F	4	Total
2,465	13.6%	32.7%	30.8%

[1] Includes standby traffic.

[2] Standby traffic not included.

Source: WA's company records.

[J.A. 659] WESTERN AIRLINES

Docket No. 18104
Exhibit No. WA-5
Page 1 of 5

WESTERN'S SAN DIEGO-DENVER NONSTOP LOAD FACTORS
(Response to Information Request 2e.(1))

1970

		Load Factor[1]		
	Flight	First	Coach	Total
June	474	—	62.1%	62.1%
	426	12.4%	32.7	29.1
	421	5.7	20.0	17.5
	425	28.5	49.9	46.7
	Total	14.9%	41.7%	38.3%
July	474	—	63.2%	63.2%
	426	12.2%	40.1	35.5
	421	4.3	23.9	20.7
	425	24.1	64.1	58.4
	Total	13.0%	47.3%	43.1%
August	474	—	66.6%	66.6%
	426	14.2%	37.3	33.3
	421	4.0	26.8	23.0
	425	35.1	63.4	59.7
	Total	16.8%	49.2%	45.3%
September	474	—	45.3%	45.3%
	426	16.1%	27.6	25.6
	421	7.8	15.0	13.8
	425	28.5	45.6	43.7
	Total	16.2%	33.2%	31.3%

[1] Western's San Diego-Denver nonstop service was inaugurated June 8, 1970.

October	474	—	44.7%	44.7%
	426	13.3%	23.5	20.8
	421	5.2	13.6	11.7
	425	26.0	45.8	41.2
	Total	14.6%	32.4%	29.1%

[J.A. 660] WESTERN AIRLINES

Docket No. 18104
Exhibit No. WA-5
Page 2 of 5

WESTERN'S SAN DIEGO-DENVER NONSTOP LOAD FACTORS

1970

		Load Factor[1]		
	Flight	First	Coach	Total
November	474	—	42.5%	42.5%
	426	18.4%	32.2	29.7
	421	6.5	16.4	14.6
	425	32.2	48.6	46.8
	Total	17.7%	35.6%	33.6%
December	474	—	64.5%	64.5%
	426	20.9%	41.1	37.7
	421	10.2	35.3	31.2
	425	41.2	57.2	55.4
	Total	22.3%	49.9%	46.7%
1970 Total— All Nonstop Flights		35.8%	39.3%	38.4%

[J.A. 661] WESTERN AIRLINES

Docket No. 18104
Exhibit No. WA-5A
Page 1 of 5

WESTERN'S SAN DIEGO-DENVER NONSTOP LOAD FACTORS
(Response to Information Request 2e.(1))
1970

		Load Factor [1]		
	Flight	First	Coach	Total
June	474	—	74.6%	74.6%
	426	12.4%	39.3	34.7
	421	5.7	24.1	20.9
	425	28.5	59.9	55.6
	Total	15.0%	50.0%	45.6%
July	474	—	72.0%	72.0%
	426	14.9%	44.7	40.6
	421	5.3	27.2	23.6
	425	29.5	73.0	66.7
	Total	15.9%	53.9%	49.2%
August	474	—	79.7%	79.7%
	426	15.3%	44.6	39.7
	421	4.3	32.0	27.4
	425	37.7	75.8	71.1
	Total	18.1%	58.8%	53.9%
September	474	—	55.3%	55.3%
	426	16.1%	33.6	30.9
	421	7.8	18.3	16.7
	425	28.5	55.6	52.7
	Total	16.1%	40.5%	37.8%
October	474	—	54.1%	54.1%
	426	13.3%	28.4	26.1
	421	5.2	16.4	14.7
	425	26.0	55.4	51.7
	Total	14.5%	39.2%	36.5%

[1] Western's San Diego-Denver nonstop service was inaugurated June 8, 1970.

[J.A. 662] WESTERN AIRLINES

Docket No. 18104
Exhibit No. WA-5A
Page 2 of 5

WESTERN'S SAN DIEGO-DENVER NONSTOP LOAD FACTORS

1970

		Load Factor [1]		
	Flight	First	Coach	Total
November	474	—	51.2%	51.2%
	426	18.4%	38.8	35.4
	421	6.5	19.7	17.4
	425	32.2	58.5	55.7
	Total	17.7%	42.9%	40.0%
December	474	—	72.3%	72.3%
	426	21.7%	46.1	42.1
	421	10.6	39.6	34.8
	425	42.7	64.1	61.8
	Total	23.1%	55.9%	52.1%
1970 Total—				
All Nonstop Flights		17.3%	48.9%	45.2%

[J.A. 663] WESTERN AIRLINES

Docket No. 18104
Exhibit No. WA-5
Page 3 of 5

WESTERN'S SAN DIEGO-DENVER NONSTOP LOAD FACTORS
1971

		Load Factor [1]		
	Flight	First	Coach	Total
January *	474	—	55.1%	55.1%
	426	43.1%	59.8	56.8
	603	23.1	23.3	23.1
	421	20.9	63.9	56.6
	425	34.6	54.4	52.1
	543	21.3	18.4	18.6
	Total	27.8%	40.4%	39.3%
February	474	—	56.6%	56.6%
	603	21.9%	32.4	31.3
	425	37.0	56.1	55.2
	543	25.1	29.0	28.6
	Total	28.2%	43.0%	41.8%
March	474	—	64.0%	64.0%
	603	37.7%	35.6	35.6
	425	37.7	55.6	51.9
	543	27.9	29.2	29.0
	Total	34.5%	45.2%	44.3%
April	474	—	61.4%	61.4%
	603	27.5%	39.8	38.5
	425	35.9	54.1	52.0
	543	18.8	31.9	30.7
	Total	27.7%	46.4%	45.0%
May	474	—	49.6%	49.6%
	603	28.0%	29.2	28.9
	425	28.6	45.5	43.8
	543	19.9	22.5	22.1
	Total	25.6%	36.7%	35.8%

* Flights 426 and 421 discontinued after January 5, 1971.
Flights 603 and 543 effective January 6, 1971.

[J.A. 664] WESTERN AIRLINES

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Exhibit No. WA-5
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WESTERN'S SAN DIEGO-DENVER NONSTOP LOAD FACTORS

1971

		Load Factor [1]		
	Flight	First	Coach	Total
June	474	—	66.3%	66.3%
	603	27.2%	36.1	35.0
	425	23.9	54.9	51.8
	543	17.8	33.7	31.5
	Total	23.0%	47.2%	45.1%
July	474	—	75.6%	75.6%
	603	35.2%	45.6	44.3
	425	35.8	62.8	60.1
	543	22.2	45.4	43.1
	Total	30.9%	56.7%	54.6%
August	474	—	74.8%	74.8%
	603	36.8%	47.6	48.0
	425	42.1	66.9	64.2
	543	28.8	46.9	45.0
	Total	35.9%	59.0%	57.2%
September	474	27.4%	52.3%	50.6%
	603	22.9	39.3	38.2
	425	34.2	60.3	57.7
	543	18.3	31.3	30.0
	Total	25.6%	45.9%	44.1%
October	474	25.3%	41.9%	40.5%
	603	31.6	35.3	34.8
	425	42.1	52.8	51.9
	543	22.2	22.1	22.0
	Total	30.2%	38.0%	37.3%

November	474	32.2%	42.9%	41.9%
	603	28.2	34.0	33.5
	425	37.9	48.9	47.9
	543	23.3	26.9	26.6
	Total	30.4%	38.3%	37.5%
December	474	21.1%	67.6%	64.6%
	603	38.7	55.2	53.0
	425	51.2	68.5	65.9
	543	32.0	55.3	52.4
	Total	38.0%	61.8%	59.1%
1970 Total— All Nonstop Flights		29.9%	46.6%	45.2%

[J.A. 665] WESTERN AIRLINES

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WESTERN'S SAN DIEGO-DENVER NONSTOP LOAD FACTORS
1971

		Load Factor [1]		
	Flight	First	Coach	Total
January *	474	—	64.2%	64.2%
	426	44.2%	69.7	65.7
	603	23.7	27.1	26.7
	421	21.4	74.5	65.5
	425	35.5	63.4	60.3
	543	21.8	21.5	21.5
	Total	28.5%	47.1%	45.5%
February	474	—	67.5%	67.5%
	603	23.8%	38.6	37.1
	425	40.2	66.9	63.9
	543	27.3	34.6	33.9
	Total	30.6%	51.2%	49.6%
March	474	—	75.1%	75.1%
	603	38.9%	41.8	41.5
	425	38.9	62.9	60.4
	543	28.8	34.3	33.8
	Total	35.6%	53.0%	51.6%
April	474	—	74.4%	74.4%
	603	28.9%	48.2	46.4
	425	37.8	65.6	62.7
	543	19.8	38.7	37.0
	Total	29.2%	56.2%	54.2%
May	474	—	62.1%	62.1%
	603	28.8%	36.6	35.8
	425	29.5	57.0	54.3
	543	20.5	28.2	27.4
	Total	26.3%	45.9%	44.3%

* Flights 426 and 421 discontinued after January 5, 1971. Flights 605 and 543 effective January 6, 1971.

[J.A. 666] WESTERN AIRLINES

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WESTERN'S SAN DIEGO-DENVER NONSTOP LOAD FACTORS

1971

		Load Factor[1]		
	Flight	First	Coach	Total
June	474	—	81.5%	81.5%
	603	27.2%	44.4	42.7
	425	23.9	67.5	63.2
	543	17.8	41.4	38.4
	Total	23.0%	58.0%	55.3%
July	474	—	84.6%	84.6%
	603	36.2%	51.0	49.5
	425	36.9	70.3	67.0
	543	22.8	50.8	48.0
	Total	31.8%	63.4%	60.9%
August	474	—	88.9%	88.9%
	603	36.8%	58.8	56.6
	425	42.1	79.5	75.7
	543	28.8	55.8	53.1
	Total	35.6%	69.6%	66.9%
September	474	28.3%	63.1%	60.5%
	603	23.6	48.1	45.7
	425	35.3	72.7	69.0
	543	19.0	37.8	35.9
	Total	26.4%	55.4%	52.7%
October	474	25.3%	52.4%	49.7%
	603	31.6	44.1	42.8
	425	42.1	66.0	63.7
	543	22.2	27.6	27.0
	Total	30.2%	47.5%	45.8%

November	474	32.2%	53.9%	51.7%
	603	28.2	42.7	41.3
	425	37.9	61.4	59.1
	543	23.3	33.8	32.8
	Total	30.4%	48.1%	46.3%
December	474	22.0%	74.4%	71.7%
	603	40.4	60.8	58.8
	425	53.4	75.4	73.1
	543	33.4	60.9	58.2
	Total	39.7%	68.1%	65.6%
1971 Total— All Nonstop Flights		30.7%	55.4%	53.3%

[J.A. 667] WESTERN AIRLINES

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WESTERN'S SAN DIEGO-DENVER NONSTOP LOAD FACTORS

1972

	Flight	Load Factor [1] First	Coach	Total
January	474	15.7%	53.2%	50.2%
	603	13.1	39.8	38.8
	425	50.7	64.9	63.4
	543	31.1	38.0	37.3
	Total	32.3%	48.2%	46.8%
February	474	29.7%	59.8%	57.7%
	603	33.1	46.5	45.1
	425	34.5	68.4	66.1
	543	30.9	37.7	36.9
	Total	32.1%	52.7%	50.9%
March	464	37.1%	60.3%	58.0%
	603	36.3	54.1	52.4
	425	50.5	71.0	69.0
	543	41.1	42.0	41.8
	Total	41.2%	57.0%	55.4%
April	464 •	34.8%	58.1%	55.6%
	603	31.4	51.8	49.7
	425	28.4	60.5	57.4
	543	16.2	32.5	30.9
	Total	27.8%	50.5%	48.3%
May	214	30.6%	51.4%	49.4%
	603	22.0	34.3	33.1
	425	33.7	52.1	50.2
	543	13.6	32.4	30.5
	Total	25.0%	42.6%	40.9%

June	214	41.7%	73.5%	72.3%
	603	32.8	50.5	48.7
	424 [2]	40.4	70.5	67.6
	425	47.8	72.2	69.3
	543	24.4	45.3	43.3
	423 [2]	26.3	55.6	52.7
	Total	35.7%	60.7%	58.4%

Note: Northwest Airlines' operations suspended June 30-October 2, 1972 due to a strike.

• Statistics for Flight 214 which replaced Flight 464 effective April 30 are included.

[1] Standby traffic not included.

[2] New nonstop flights effective June 18.

[J.A. 668] WESTERN AIRLINES

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WESTERN'S SAN DIEGO-DENVER NONSTOP LOAD FACTORS

1972

	Flight	Load Factor[1] First	Coach	Total
July	214	19.6%	62.2%	57.0%
	603	29.5	47.6	45.7
	424	52.9	70.4	68.5
	425	39.2	63.1	60.7
	543	24.8	50.5	47.9
	423	42.6	59.6	57.9
	Total	34.4%	58.9%	56.4%
August	214	19.2%	67.3%	60.7%
	603	30.4	54.5	52.1
	424	48.3	77.8	74.8
	425	25.5	64.7	61.0
	543	24.8	50.1	47.6
	423	37.5	65.1	62.4
	Total	30.6%	63.4%	59.9%
September	214	21.3%	41.3%	39.4%
	603	33.9	36.8	36.3
	424	34.7	55.8	53.7
	425	33.6	47.6	46.1
	543	26.4	34.0	33.1
	423	31.4	51.0	49.0
	Total	30.2%	44.6%	43.2%
October	214	21.6%	34.5%	33.4%
	603	28.9	36.3	35.5
	424	36.8	54.9	53.1
	425	32.1	42.3	41.3
	543	30.5	33.5	33.1
	423	35.2	49.6	48.2
	Total	30.8%	41.7%	40.6%

November	214	25.9%	43.7%	42.0%
	603	29.9	42.1	40.9
	424	41.4	59.6	57.8
	425	27.2	43.0	41.4
	543	38.8	40.6	40.3
	423	42.2	51.8	50.8
	Total	33.8%	46.6%	45.4%

Note: Northwest Airlines' operations suspended June 30-October 2, 1972 due to a strike.

[1] Standby traffic not included.

Source: Western Airlines' company records.

[J.A. 669]

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SALES AND PROMOTION

Continental has adopted a marketing philosophy which emphasizes strong and aggressive promotional efforts. Our experience shows that such efforts will promote the development of, and the carrier's participation in, air transportation markets. Continental, therefore, allocates proportionately more of its revenues to advertising and other promotional efforts than does any other trunk carrier (CO-803).

In developing its advertising and promotional program, Continental has adopted the concept of a total marketing program which includes:

1. Developing a superior package of services oriented to satisfy the needs of the public; two of the major features of this package are the Director of Passenger Services, on board all three and four engine jets, and the comfort of 3 and 2 seating for coach and economy passengers. Some other carriers have, finally, adopted the feature of having a Director of Passenger Services aboard their aircraft although, in most cases, such availability is restricted to the Boeing 747. The comfort of 3 and 2 seating for coach and economy passengers, pioneered by Continental, has also received acceptance by some other carriers.

2. Acquainting the public with this service package.

3. Developing special promotional fares to appeal to as broad a spectrum of potential travelers as practicable.

4. Acquainting the public with these fares and promoting their use.

5. Motivating the public to travel by creating interest in the markets and by developing tours to the lesser-known as well as the better-known markets served.

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[J.A. 670] 6. Supporting the travel agent and better acquainting him with the markets and Continental's service, thereby employing the most effective voice in the travel industry in reaching the public.

Developing New Markets

Continental has long realized the necessity for having a dynamic program of advertising and promotion upon the inauguration of new service. Historically, we have allocated an initial promotional budget of $300,000 for each new city to be served, $100,000 for each Continental city that is on the new route and $25,000-$50,000 for each beyond city on Continental's system that would receive single-plane or connecting service in conjunction with the new route. Through this strong initial effort, we have been able to attract public attention at the outset to the features of our new services and attract more people to the use of air service. Typical of the effort made by Continental in a new market was our initial program for promoting our new Hawaii markets. In this market, we introduced a new service package, consisting of the new off-peak fares pioneered by Continental, the greater comfort of 3 and 2 seating for coach and economy passengers, an optional meal service for economy passengers at a modest added cost, our high quality of inflight service, including our unique Director of Passenger Services, and also a new stereo and movie system. Similar efforts have been put forth in initiating service during the past few years over

our San Francisco-Albuquerque route, the Ontario satellite service introduced over our Chicago-Los Angeles route, and our California-Pacific Northwest route (CO-802, p. 2). After the initial program, tied to inauguration of the service, we continue strong promotional efforts in all of our markets. Some of the principal programs and the approaches used are set forth below.

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[J.A. 671]

"Continental Holidays" Tour Program

To focus attention on markets Continental now serves and to develop traveler interest in these areas, the "Continental Holidays" family of package tours has been developed. In constructing these tour packages, Continental has worked closely with tour wholesalers. Where feasible, existing wholesaler tours have been packaged in the Continental format and jointly merchandised and promoted with the wholesaler.

In areas where no tours exist, Continental seeks to interest and assist wholesalers in packaging new tours. But when the wholesalers are not in a position to develop a particular tour or tours, Continental undertakes the task itself. For example, Continental worked closely with the Tourism Council of Greater Chicago to create the first seven-day-a-week tour package to sell Chicago as a tourist destination. Chicago, of course, is a city which is not normally considered a tourist destination, but this tour package has proven quite successful. Similarly, Continental was instrumental in creating the first tour program for the city of El Paso, Texas. Here we created a joint tour for El Paso and Juarez, Mexico, in an effort to bring out the border flavor of the area and broaden the

tourism appeal. This tour package has been successfully sold not only by Continental, but also by other carriers serving El Paso.

Two of the detailed Continental Holidays brochures on specific tours are in CO-802; in addition to our regular tours, we have developed a series of shorter tours which we have entitled "Mini-Tours." To supplement the brochures, which are distributed directly by Continental and travel agents, we have a complementary program of short ads, principally in newspapers, to make a broad cross-section of the public aware of the availability of these Continental Holiday Tours. An important part of our Holiday Tour Program is the tour-basing fare which Continental pioneered in domestic markets (CO-103).

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[J.A. 672]

Convention and Group Sales

Continental actively seeks and develops convention and group sales travel not only by responding to existing needs but also by creating new opportunities, such as aiding in the selection of meeting sites. Separate emphasis is placed on the sale and servicing of each category of group travel: (1) Convention and trade shows, (2) business and incentive meetings, and (3) group movements—covering cargo as well as passenger traffic. Some of the services provided are: Supplying imprinted mailers, organizing pre- and post-event tours, providing on-site reconfirmation and airline ticketing facilities, and performing the role of an official coordinating carrier assisting the sponsoring organization with all air travel arrangements and related services.

Travel Agent Motivational Campaign

Continental relies heavily upon travel agents for the sale of its services. Nearly 25 percent of Continental's 1968 passenger revenues was derived from travel agent sales; because of his important role, the travel agent is the subject of considerable promotional effort by Continental. Each year Continental conducts a major advertising campaign to promote the passenger's use of the travel agent; advertisements in local newspapers and national magazines, direct mail pieces, window banners and counter cards are used to bring the travel agent to the attention of the public. Continental regularly brings groups of agents to its Los Angeles training center and, in addition, offers familiarization tours to provide first-hand information concerning the areas of the country served by Continental.

8/23/71

Supreme Court, U. S.
FILED
DEC 5 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-711

WESTERN AIR LINES, INC.,
Petitioner,

v.

CONTINENTAL AIR LINES, INC.,
Respondent.

BRIEF FOR RESPONDENT CONTINENTAL AIR LINES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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December 5, 1975

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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WESTERN AIR LINES, INC.,
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CONTINENTAL AIR LINES, INC.,
Respondent.

BRIEF FOR RESPONDENT CONTINENTAL AIR LINES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Continental Air Lines, Inc. (Continental) submits this brief in opposition to the petition of Western Air Lines, Inc. (Western) for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit for review of that court's decision and judgment in *Continental Air Lines, Inc.* v. *Civil Aeronautics Board*, Case No. 74-1651, entered on September 22, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals, review of which Western seeks, is printed in Appendix A accompanying Western's petition before this Court and is reported at 519 F.2d 944 (D.C. Cir. 1975).[1]

RESPONSE TO PETITIONER'S STATEMENT OF QUESTIONS PRESENTED

This is an airline route case which began in 1967, in which the Civil Aeronautics Board twice refused to certificate a carrier to compete with Western between San Diego and Denver, after two evidentiary hearings in which an independent Bureau of the Board had urged and the Administrative Law Judge had found that the market required and would support competitive service, and that Continental should be selected to provide it.

Continental sought review in the Court of Appeals for the District of Columbia. The Department of Justice declined to represent the Board on appeal, and filed an amicus brief for the United States supporting Continental's appeal. The Court of Appeals reversed and remanded the case to the Board on the grounds that the Board's findings were not supported by substantial evidence of record. The Board has sought neither reconsideration nor this Court's review, and has cited the court's decision with approval in a subsequent order.

The case presents no issue which should command this Court's attention. There is no conflict between

[1] References to the Court of Appeals opinion will be to the appendix to Western's petition, cited as "Appendix." References to the record will be to the Joint Appendix filed with the Court of Appeals, cited as "JA".

circuits. The decision of the Court of Appeals is not inconsistent with the prior decisions of this Court. Its interpretation of the Federal Aviation Act is neither novel nor erroneous, illustrates no judicial "activism," involves no usurpation of the Board's administrative function, and gives rise to no dire consequences. Thus, none of the questions which Western poses in its petition is legitimately presented by the opinion below, and Western's petition should be denied.

STATEMENT

A concise statement of the case, containing the facts material to the consideration of the questions raised by Western, is contained in the opinion of the Court of Appeals. Appendix, pp. 4a-13a. The statement of the case offered by Western is misleading in a number of respects which will be discussed in the argument. For the convenience of the Court, Continental will here set out a brief summary of the history of this proceeding.

This case arose out of a proceeding that began in 1967 for the purpose of providing improved service between San Diego and each of four cities to the east: Chicago, Denver, New York and Washington. The Board has since certificated competitive nonstop service in all of those markets except San Diego-Denver.

The San Diego-Denver market has been the subject of two separate administrative proceedings, with full evidentiary hearings, briefs to the Administrative Law Judge, Initial Decisions by the Administrative Law Judge, briefs to the Board, oral argument before the Board and requests for Board reconsideration.

Twice the Board's independent Bureau of Operating Rights and the Administrative Law Judge recom-

mended the certification of Continental as a competitor with Western in the San Diego-Denver market. Twice a bare majority of the Board, over vigorous dissents, decided to maintain Western's monopoly.

The second administrative hearing was occasioned by the Board's discovery of an error in its first opinion. On April 16, 1971, the Board *sua sponte* issued an order on remand, withdrawing its original profit and loss forecast and substituting a new one which showed a loss of only $1,000 for Western in the first year of competition. Order 71-4-112; J.A. 79. The Board said that "Western's financial result would range from a slightly below breakeven to a somewhat profitable one" in 1971 and found that:

> "The revised figures render extremely close the balance of decisional criteria—harm to Western under existing economic conditions weighed against public benefit factors favoring competition and improved beyond service—in determining whether such competition should be authorized." *Id.*, p. 1; J.A. 79.

After a second hearing, the Administrative Law Judge issued a detailed decision in which he found that (1) Western's service was not responsive to the public need; (2) Western and Continental could compete profitably in this strong and growing market; and (3) Continental should be selected to compete with Western because of its superior service benefits and low fares. Supplemental Initial Decision, March 20, 1972; J.A. 526.

In a 3 to 2 decision, the Board acknowledged that the San Diego-Denver route "offers a potential for future certification of competition," but again refused to authorize competitive service. Order 72-12-29; J.A. 83. The Board based its decision, not on an analysis of the particular market or evidence in the case, but on the majority's generalized assertion that "during a period of lagging traffic growth . . . we must be more than unusually careful to avoid impeding the industry's opportunities for full recovery." *Id.*, p. 2; J.A. 85. Unlike its earlier decision, the Board's opinion after remand contained no profit and loss estimate for either Continental or Western, and said nothing about the benefits of competition. It did not discuss the "balance of decisional criteria" it had identified in its remand order.

Fifteen months later, the Board issued its opinion on reconsideration. Order 74-5-17; J.A. 100. That opinion reiterated the Board's earlier premise for decision, namely that:

> "The industry continues to falter in its attempts to make the financial recovery which our policy of caution was designed to assist. This fortifies our resolve to avoid making unnecessary awards of competitive authority on routes which are adequately served." *Id.*, p. 2; J.A. 101.

Although it reaffirmed its decision to keep the Denver-San Diego market a monopoly for Western, the Board finally had to concede that "the data which has become available since the original decision was reached now tends to indicate the prospects for profitable competitive operations are far stronger than earlier believed," and that "competitive service would be more profitable than originally anticipated . . . ." *Id.*, pp. 8, 13; J.A. 107, 112.

However, the Board then announced that its original decision "did not turn on profitability." *Id.* p. 10;

J.A. 109. The Board provided no explanation for this statement, nor did it ever address the "balance of decisional criteria" it had identified in its order on remand.

Continental appealed the Board's decision to the United States Court of Appeals for the District of Columbia Circuit in accordance with Section 1006(b) of the Federal Aviation Act, 49 U.S.C. § 1486(b). Continental argued: (1) that the Board had failed to observe the mandate of Section 102(d) of the Act requiring the Board to consider "competition to the extent necessary . . ." as an element in determining the public interest; (2) that the Board had not adequately explained the reason for its decision to keep a monopoly in the San Diego-Denver market, particularly in view of its admission that competition would be profitable; and (3) that there was no substantial evidence of record to support the Board's rationale that so-called "industry conditions" compelled the maintenance of a monopoly in the San Diego-Denver market.

The court found it necessary to address the statutory provision respecting "competition to the extent necessary . . ." because both Board counsel and Western had argued that the provision was of no particular significance (a position contrary to the Board's prior decisions), and in any event was overshadowed by other statutory considerations. Appendix, pp. 14a-15a.

The court interpreted the statute in the same manner as had the Board itself in a long and consistent line of cases stretching over 30 years.[2] While Western seeks to create the impression that the court ordered

[2] These Board decisions are identified in the court's opinion. Appendix, pp. 17a-19a.

the Board to authorize competition in every case, the court's holding speaks for itself:

> ". . . there is no presumption in favor of competition *per se* because competition may prove uneconomical and destructive of the healthy development of the industry if the relevant market is too small to support competing carriers. But when sufficient traffic exists to support competition, certification of competing carriers is mandated by the Act as providing the best means of effectuating the other public interest goals contained in § 102." Appendix, p. 19a, footnote omitted.

The court reviewed the Board's own construction of Section 102, and pointed out that the Board "has from the outset [of the Act] consistently taken that position." *Id.*, p. 20a.

The court then proceeded to examine the Board's opinions in order to determine "whether there is substantial evidence indicating that the San Diego-Denver market lacks sufficient traffic potential for healthy competition or that another public interest consideration outweighs the significant benefits afforded by competition." *Id.*, pp. 20a-21a.

After reviewing the Board opinions, the court, quoting from this Court's opinion in the *Permian Basin* case, concluded that:

> "Section 102 sets forth six public interest factors to guide the CAB in the exercise of its statutory duties. We are cognizant that in reviewing agency orders '[t]he courts' responsibility is not to supplant the [Board's] balance of these interests with one more nearly to its liking,' but the state of the record establishes that the Board recited the public benefits to be derived from competition, and did not itself accord them any real weight in the

balance, dismissing them, in effect, as overborne by considerations, of the health of the industry and the fuel situation, which lacked any support in substantial evidence." *Id.*, pp. 29-30a, footnote omitted.

The court remanded the case to the Board, noted that it was commenced 8½ years earlier and Western's position that "[p]ublic policy dictates that the case be brought to an end," and requested that the Board proceed expeditiously on remand with the selection of a competing carrier. *Id.*, p. 30a. However, the court indicated that if the Board should desire a modification of this mandate in order to take further evidence on the question of competitive service, the Board should set forth "with particularity" the matters to be dealt with in further hearings. *Id.*

On the question of selecting a competing carrier, the court said that it was up to the Board either to affirm the Administrative Law Judge's decision or to make its own selection, setting forth its reasons for doing so. *Id.*, p. 31a.

On November 25, 1975, the Court of Appeals granted Western's motion to stay the issuance of the court's mandate pending review by this Court. The Board has taken no action.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

There are no special or important reasons for this Court to review the instant case on writ of certiorari and the writ should not be granted. The decision of the Court of Appeals is not in conflict with the decision of another Court of Appeals on the same matter, nor has the Court of Appeals decided a federal question in a manner conflicting with applicable decisions of this Court.

1. The Court of Appeals' Interpretation of the Federal Aviation Act Is Neither Novel Nor Erroneous

Western's argument to this Court is largely a repetition of its argument to the Court of Appeals. Essentially, Western asserts that this Court should review this case to "provide guidance" to the Board and the Court of Appeals with respect to what it contends is a novel and erroneous interpretation of the Federal Aviation Act by the Court of Appeals. Petition, pp. 7, 19.

The short answer to Western's argument is that the court's interpretation of the statute is the same as the Board's own interpretation under which it has functioned successfully for 38 years. The Board does not need further "guidance" on this matter and, indeed, has not sought it.

In what it concedes is a "tedious" discussion of the subject (Petition, p. 17), Western contends that the Board's interpretation of the pro-competitive mandate in Section 102(d) has ebbed and flowed over the years in tune with general economic cycles (Petition, pp. 11-18). Western bases this contention on a recitation of the history of the Board's practices over the years in setting down new route cases. From this Western concludes that the Board has been more inclined to institute new route cases during periods of carrier prosperity.

Whether the Board's history supports Western's generalization is beside the point. The policy followed by the Board during a particular period with respect to its own docket is a different matter than the Board's interpretation of the pro-competitive mandate of the statute. The latter has not varied with economic conditions. For example, during the 1970-1971 recession

the Board reaffirmed its long-held view of its competitive mandate:

> "One of our principal policies has been that the traveling public is entitled to the benefits of competition whenever it is justified by existing and projected market traffic. We have stated that major markets require competition regardless of the quality of service provided by monopoly carriers."[3]

Even more recently the Board held that in an air transport system "enjoined to preserve '[c]ompetition to the extent necessary . . .,' the Board prefers to trust in competition, rather than monopoly, as the agent of change."[4]

The Board's interpretation of its statutory competitive mandate is expressed in decisions rendered during every economic and political climate.[5] In an early case the Board held that the statute creates a "strong, although not conclusive, presumption in favor of competition on any route which offers sufficient traffic to support competitive services without unreasonable increase of total operating costs."[6] Compare the Board's interpretation with that by the court in this case:

> "The legislative history and the early CAB decisions indicate that there is no presumption in favor of competition *per se* because competition

[3] *Domestic Passenger Fare Investigation,* Order 71-4-54, April 9, 1971, p. 27.

[4] *Express Service Investigation,* Order 73-12-36, December 7, 1973, p. 33.

[5] Examples of these cases are found in the court's opinion, Appendix, pp. 17a-20a.

[6] *Colonial Airlines, Inc., Atlantic Seaboard Operation,* 4 CAB 552, 555 (1944).

> may prove uneconomical and destructive of the healthy development of the industry if the relevant market is too small to support competing carriers. But when sufficient traffic exists to support competition, certification of competing carriers is mandated by the Act as providing the best means of effectuating the other public interest goals contained in § 102." Appendix, p. 19a.

Not only has the court adopted the same interpretation of the statute as that consistently followed by the Board, but in a decision issued *after* the court rendered its opinion the Board reaffirmed that interpretation and indicated its agreement with the court's opinion:

> "As the Board has often observed and as the courts have recently emphasized, the Act requires the Board to foster competition as a means of enhancing the development of air transportation on routes which can support competing carriers—except where the benefits of competition are outweighed by other public interest considerations. See *Continental Air Lines* v. *CAB,* C.A.D.C., No. 74-1651, September 22, 1975."[7]

Thus, Western's attempt to portray the court's interpretation as an aberration is belied by the Board's stated agreement with that interpretation. The only aberration was the Board's decision in this case—a decision which the Board now recognizes was in error.

Having stated its agreement with the court's interpretation of the statute as being identical to its own long-held view, the Board has put to rest Western's contention that the court's decision would force radical changes in the Board's docketing of cases and the par-

[7] *Remanded Reno-Portland/Seattle Nonstop Service Investigation,* Order 75-11-45, November 12, 1975, p. 5.

ties' burden of proof in competitive airline route proceedings.

There is no basis whatever for Western's dire predictions of administrative chaos. The Board has been acting under the same statutory interpretation for 38 years, and has found no difficulty in establishing priorities and exercising control over its docket. Similarly, the burden of proof in competitive airline route cases has always been and will continue to be on those seeking to show that a particular route can support competitive service. It is only "when sufficient traffic exists to support competition, [that] certification of competing carriers is mandated by the Act" (Appendix, p. 19a), unless, in the Board's words quoted above, "the benefits of competition are outweighed by other public interest considerations." In this case, Continental met that burden of proof. The Board's error was that, while agreeing that competition would be viable, it attempted to avoid competition by reference to so-called "industry" factors of no demonstrated relevance to the market at issue and which had no support in substantial evidence.

Western also is wrong in asserting that the District of Columbia Circuit is alone in recognizing the Board's statutory competitive mandate. For example, in *Northeast Airlines, Inc.* v. *CAB,* the First Circuit held that:

> "Two needs are involved: the physical need—for seats to carry the traffic and the statutory need for competition as a stimulus to provide good service to the public and to develop a sound air transportation system."[8]

[8] 331 F.2d 579, 588 (1964).

Inasmuch as the Board and the courts agree that the Board has a statutory responsibility to foster sound competition, as being in the public interest, no conflict exists for this Court to resolve.

2. The Court Did Not Encroach Upon the Board's Administrative Functions

Western's second line of attack is that the Court of Appeals (1) substituted its judgment for that of the Board and (2) attempted to dictate the Board's decision on remand, contrary to this Court's holding in *FCC* v. *Pottsville Broadcasting Co.,* 309 U.S. 134 (1940).

The best answer to this argument is to read the decision of the Court of Appeals. Upon reviewing the Board's opinions, the court found that the Board's stated reasons for rejecting competition in this case were not supported by substantial evidence. Appendix, pp. 29a-30a. Clearly, a review of the record to determine whether the agency's findings are supported by substantial evidence is a legitimate function of a reviewing court. *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 168 (1962).

Since the Board had admitted in its order on reconsideration that competition in the San Diego-Denver market would be profitable, and since the Board's stated reasons for rejecting competition had no support in the record, the court remanded the case to the Board. Appendix, p. 30a.

Nothing in the court's remand constituted improper interference with the agency's responsibility. Noting that the case had consumed 8½ years and had been the subject of two full evidentiary hearings, the court agreed with Western that "[p]ublic policy dictates

that the case be brought to an end." The court therefore directed that the Board "proceed expeditiously on remand with the selection of a competing nonstop carrier." *Id.*

Western is offended by the fact that the Court of Appeals found that "[t]he record before us contains ample evidence of the need for competing non-stop service" (Appendix, p. 30a). See Petition, p. 20. The court was simply, and quite properly, drawing its own inference from the record. *Commissioner* v. *Scottish American Investment Co.,* 323 U.S. 119, 124 (1944). However, this inference did not bind the Board. Even though there was no substantial evidence in the record to support the Board's decision that competitive service is not required in this market, the Board was given the option to take further evidence on the issue of competitive service.

Similarly, nothing that the Court of Appeals did with respect to carrier selection conflicts with the *Pottsville* case. In *Pottsville,* the Court of Appeals had issued a writ of mandamus to the FCC, directing the FCC to hear on remand only the application of the Pottsville Broadcasting Company. 309 U.S. at 140. Speaking for this Court, Mr. Justice Frankfurter said that the Court of Appeals could not "write the principle of priority into the statute. . . ." *Id.* at 145. In this case the Court of Appeals made no attempt to limit the Board's choice of a carrier on remand. The Board was left free either to adopt or reject the decision of the Administrative Law Judge selecting Continental. Appendix, p. 31a.

The court simply required the Board to discharge its statutory duty and to do so expeditiously. The court

was not telling the Board *how* to exercise its discretion but only that the discretion in fact *be exercised* and *be supported* with cogent reasons. *Addison* v. *Holly Hill Fruit Products, Inc.,* 322 U.S. 607, 622-23 (1944), *reh. den.,* 323 U.S. 809 (1944).

However, the court also said that if the Board wished to take additional evidence, the Board should petition the court for modification of the mandate, setting forth "with particularity" the matters to be dealt with in a third evidentiary hearing. Appendix, p. 31a. This was the only limitation the court placed on the Board. The decision whether to ask for a modification of the mandate in order to take additional evidence was left to the Board.

Clearly, the court has the power to issue reasonable instructions on remand to the Board. Section 1006(d) of the Federal Aviation Act, 49 U.S.C. § 1486(d), gives the Court of Appeals: ". . . exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board. . . ." Moreover, the court's instructions were clearly reasonable.

Given the fact that this 8½-year-old case had gone through two full administrative hearings, the court was justified in asking the Board to support whatever request it might make for a third such hearing. *Ford Motor Company* v. *NLRB,* 305 U.S. 364, 374 (1939); *Secretary of Agriculture* v. *United States,* 347 U.S. 645, 655 (1954).

Moreover, the history of this case before the Board clearly justified the court's requiring the Board to identify in advance the issues to be dealt with in a third hearing. In its remand order following the first hearing, the Board had seemed to specify the issues to be

resolved in the remanded hearing. It identified the "decisional criteria—harm to Western under existing economic conditions weighed against public benefit factors favoring competition and improved beyond service. . . ." Order 71-4-112; J.A. 79. It then proceeded in its subsequent orders to ignore those criteria and base its decision on factors not explored in the hearing. The court's requirement is calculated to prevent a recurrence of this departure from reasoned decision-making.

The remand instructions given by the Court of Appeals in this case are in no way similar to the court's pervasive mandate struck down by this Court in *NLRB* v. *Food Store Employees Union, Local 347,*[9] on which Western relies. Petition, pp. 22-23. In the *Food Store Employees* case, the court modified and enlarged on an NLRB order and directed that the union be reimbursed for organizational and litigation costs.

In this case, the court merely directed the Board to act expeditiously. The Board is free to take additional evidence if it first identifies to the court the issues which it wishes to explore in a further hearing. Nothing in the court's opinion suggests that such a hearing would be denied if the issues were first identified by the Board. Appendix, p. 30a. The Board is also free to select a competing carrier of its choice. Western is guilty of proffering sheer speculation in "assuming" that the court "will take further steps to impose its will on the agency." Petition, p. 23. The court has taken no such "steps," nor is there any indication that it will do so. The Board has not indicated that it wishes to take additional evidence. If it does, there is no in-

[9] 417 U.S. 1 (1974).

dication that the court will not permit it to do so. Western's predictions that the court will interfere with the Board's prerogatives hardly furnishes a basis for review before such interference has occurred.

Finally, Western argues: "At the very least, the reservation in the court of power to approve or disapprove of the hearings brings powerful pressures on the Board to comply with the Court's wishes." Petition, p. 23. Indeed it does, and well it should; for all that the court wishes is an expeditious disposition of this case in accordance with the evidence of record. On the face of it, it would appear that two hearings and nine years are enough. If the Board concludes that further hearings are necessary, it is required to set forth "with particularity" the issues to be considered and their relevance to the statutory standards, in order "[t]o avoid any unnecessary delay." Appendix, p. 30a.

It was Western which argued in its brief to the Court of Appeals that "[p]ublic policy dictates that the case be brought to an end." However, it then was urging affirmance of a decision which would have perpetuated its monopoly. That decision having been reversed, Western now attempts through this petition or through a third evidentiary hearing further to protract this litigation and thus preserve that monopoly for at least a few more months or years.

In sum, what the Court of Appeals did here was to "lay bare" the Board's error of law in failing to observe its statutory public interest mandate. *FPC* v. *Idaho Power Co.,* 344 U.S. 17 (1952), *reh. den.,* 344 U.S. 910 (1952). The court searched the Board's findings for substantial evidence to support the Board's findings and found none. *Burlington Truck Lines* v. *U.S., supra.* It then remanded the case to the Board

for a decision in accordance with the statute and consistent with substantial evidence of record. *Ford Motor Co.* v. *NLRB, supra.* While arguably the court could have made a final decision of its own, in order to bring this long controversy to an end "without further delay," [10] it remanded the case to the Board to allow the Board to "enforc[e] the legislative policy committed to its charge." *FCC* v. *Pottsville Broadcasting Co., supra,* 309 U.S. at 145.

3. The Court of Appeals Has Not Departed from the Accepted and Usual Course of Judicial Proceedings, and There Is No Occasion for the Exercise of This Court's Power of Supervision

Western's final appeal is that this Court review not the decision in this case, but the alleged "judicial activism" of the D.C. Circuit in reviewing the actions of administrative agencies. Western attributes to the D.C. Circuit a "'partnership' theory" under which "the court on review is entitled to substitute its judgment for that of the agency. . . ." Petition, p. 29. It suggests that "[t]he time is ripe for the Supreme Court to exercise its power of supervision," because "[i]t is obvious that court burden and delay will increase as the court injects itself more and more into its 'partnership' with the agencies." *Id.*, p. 31.

Western's argument is not only specious; it is brazenly inappropriate in its criticism of particular judges. The Court of Appeals has not departed from the usual course of judicial proceedings. Specifically, neither in this case, nor in the prior cases cited by Western as examples of judicial "activism," has the D.C. Circuit substituted its judgment for that of the

[10] *FTC* v. *Curtis Publishing Co.*, 260 U.S. 568, 580 (1923).

agency or exceeded the permissible limits of judicial review. Nothing in the decision below calls for the exercise of this Court's power of supervision.

Ironically, Western finds the roots of the D.C. Circuit's "new 'activism'" in *Niagara Mohawk Power Corp.* v. *FPC,*[11] and in *Greater Boston Television Corp.* v. *FCC* [12]—both cases in which the D.C. Circuit affirmed agency action and the latter one which this Court declined to review on certiorari. Neither of these cases asserted the proposition that the court was entitled to substitute its judgment for that of the agency.

Western is fearful of the implications of the court's use of the terms "partnership,"[13] and "constructive co-operation"[14] to describe the relationship between administrative agencies and reviewing courts. Western's alarm comes somewhat late. In 1939 Mr. Justice Stone observed:

> "Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through co-ordinated action." [15]

Similarly, Mr. Justice Frankfurter observed in 1941 that administrative agencies and courts are "collabora-

[11] 379 F.2d 153 (D.C. Cir. 1967).

[12] 444 F.2d 841 (D.C. Cir. 1970), *cert. denied,* 403 U.S. 923 (1971).

[13] *Id.*, at 851.

[14] *International Harvester Co.* v. *Ruckelshaus,* 478 F.2d 615, 648 (D.C. Cir. 1973).

[15] *United States* v. *Morgan,* 307 U.S. 183, 191 (1939).

tive instrumentalities of justice,'' [16] and spoke in 1943 of ''accommodating relationships between the judiciary and administrative agencies.'' [17]

The idea that the concept of ''partnership'' means that the court on review is entitled to substitute its judgment for that of the agency is Western's invention, not that of the D.C. Circuit. In fact, that court's view is diametrically opposite. As it stated in *Greater Boston*: ''If the agency has not shirked this fundamental task [of reasoned decision-making] the court exercises restraint and affirms the agency's action even though the court would on its own account have made different findings or adopted different standards. . . . The process thus combines judicial supervision with a salutary principle of judicial restraint, an awareness that agencies and courts together constitute a 'partnership' in furtherance of the public interest, and are 'collaborative instrumentalities of justice.' '' [18]

Moreover, it appears that the District of Columbia Circuit not only advocates judicial restraint, but practices it. A recent study indicates that in 1974 the circuit courts and other intermediate courts reviewed 506 agency actions, of which 330 or 65% were affirmed. The District of Columbia Circuit decided approximately 20% of the total, 101 out of 506 cases, and affirmed in 63% of the cases—approximately the same rate of affirmance as the average of all circuit and intermediate courts. The District of Columbia Circuit

[16] *United States* v. *Morgan*, 313 U.S. 409, 422 (1941).

[17] *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 622 (1944).

[18] *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 851-52 (1970).

affirmed a larger proportion of the administrative cases which it considered than did the First Circuit, the Third Circuit, the Fourth Circuit, the Eighth Circuit, or the Tenth Circuit.[19]

Contrary to Western's suggestion, the greater than average caseload of administrative cases borne by the District of Columbia Circuit is not the result of that court's ''judicial activism,'' but the result of geography and statutes. As Mr. Justice Brennan observed in his tribute to Judge Bazelon in a recent volume of the *Georgetown Law Journal*:

> ''Moreover, the District of Columbia courts have traditionally played a unique role in the resolution of public law questions of nationwide importance. In part because Congress has often made no other forum available, and in part because interests of convenience so direct, much of the litigation brought by and against the federal government is heard in the District of Columbia courts.'' [20]

It is obvious that a review of this case would have no effect on the caseload of the Circuit Court for the District of Columbia, or of the federal appellate courts generally.

CONCLUSION

It will be apparent from the foregoing discussion that there are no novel or serious issues posed by this case which warrant this Court's time and attention. There are no special and important reasons for its review on writ of certiorari. This is a simple airline

[19] Gardner, *Federal Courts and Agencies: An Audit of the Partnership Books*, 75 Colum. L. Rev. 800, 805 (1975).

[20] 63 Geo. L. J. 1 (1974).

route case, which is unique only in the inordinate length of time which the Board spent in deciding it.

The case is now in its ninth year. Seven years have passed since the first hearing, in which the Administrative Law Judge determined that the San Diego-Denver market required and could support competitive service, and that Continental's selection would bring the greatest benefits to passengers in that market and in beyond markets which would receive improved service to San Diego. Public policy indeed dictates that the case be brought to an end. The decision of the Court of Appeals is calculated to bring it to an end as expeditiously as the Board can do so. The Board has indicated its agreement with the court's decision.

WHEREFORE, Respondent respectfully requests that the writ of certiorari be denied.

Respectfully submitted,

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December 5, 1975

Supreme Court, U. S.
FILED
JAN 6 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-711

WESTERN AIRLINES, INC., *Petitioner*,

v.

CONTINENTAL AIR LINES, INC., *Respondent*.

REPLY BRIEF FOR PETITIONER WESTERN AIRLINES, INC.

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CONTINENTAL AIR LINES, INC., *Respondent*.

REPLY BRIEF FOR PETITIONER WESTERN AIRLINES, INC.

Western Airlines, Inc. (Western), Petitioner in this cause submits this brief in reply to the Brief filed by Respondent, Continental Air Lines, Inc. (Continental) on December 5, 1975.

Western regrets that this brief was not filed earlier. Continental's brief was due on December 15, 1975. Continental chose to file on December 5, but did not serve a copy on Counsel for Western. Counsel in Washington was not aware of filing until he inquired of counsel for Continental on December 18. Counsel for Western in Los Angeles did not receive a copy of Continental's

brief until December 29. Communications and mailing problems between Washington and Los Angeles during the Christmas season together with late service have delayed the filing of the reply brief until now.

A. Continental's Restatement of the Case

The statement of the case is set out clearly and concisely at pages 3-7 of Western's Petition. Continental's restatement of the case appears at pp. 3-8 of its brief. Much of the difference between the two statements is attributable to the advocate's prerogative to state the case in the way most favorable to his cause. But additional comment is necessary on at least one misleading aspect of Continental's statement.

On page 3 of its brief Continental states that the C.A.B. certificated competitive nonstop service in all of the markets at issue in this case except San Diego-Denver. While the statement is technically correct, it leaves the false impression that the Board awarded no new authority in the San Diego-Denver market.

As pointed out on page 3 of the petition, the Board awarded "new nonstop authority in each of the markets at issue, by removing operating restrictions from carriers which already held authority to serve them." In the San Diego to Chicago, Washington and New York markets there was existing nonstop authority so the new award was second nonstop authority to another carrier. In the San Diego-Denver market no carrier held nonstop authority at the time. However, the award of first nonstop authority to Western resulted in very significant service improvements.

Thus, this case has already produced substantial service benefits for the public, regardless of the disposition afforded the part which is now at issue before this court.

B. The Time Required To Decide This Case

In its restatement and at other places in its brief Continental makes much of the time which has elapsed since the first phase of this case began. It implies that this is another example of the stereotyped administrative lag—a case in which administrative lethargy or nonfeasance has unnecessarily delayed action which is required in the public interest. Continental claims that the length of time involved justifies the extraordinary control which the lower court is trying to exercise over the remanded proceedings before the C.A.B. (Continental Br. pp. 8, 13, 15, 22).

Continental's position is not valid. This is not an instance of administrative lag of inaction. To the contrary, since this case was instituted the Board has held two full hearings in it. As pointed out above and in the petition, the first hearing and decision resulted in substantial new service in San Diego markets, including San Diego-Denver.

After the first hearing the Board found that it would not be in the public interest to award competitive nonstop authority in the San Diego-Denver market. The case had been decided.

However, alleged new facts brought out for the first time in petitions for reconsideration, particularly by Continental, caused the Board to reconsider the need for competitive authority in the San Diego-Denver market. A computational error in a subsequent order on reconsideration (See Petition p. 4) resulted in a reopening of the proceeding. The parties were plunged into another full hearing.

This, of course, was to the advantage of Continental and the other applicants for competitive authority,

whose applications had been denied, during the first phase of the case. It kept their hopes alive. But, it was a decided disadvantage to Western, the incumbent carrier on the route. Even though the Board had already found that Western's service was adequate to meet the needs of the market, Western was again plunged into an expensive, time-consuming hearing, primarily because the Board was uncomfortable with the legal posture of the case after discovery of the computational error in its order on reconsideration.

After completing its second full hearing in a four year period the Board again decided by majority vote that competitive service was not required between San Diego and Denver (Order 72-12-29, Appendix, p. 37a).

Again Continental kept its hopes alive by petitioning for reconsideration, and, after denial of its petition by the Board (Order 74-5-17, Appendix 37a), by seeking judicial review.

Thus, Continental's repeated references to the time required to process this case have a hollow ring. Continental cannot claim prejudice because it has been basically responsible for the delay. On the other hand, Western has been seriously prejudiced by having to go through a second hearing and court appeal on a matter which we consider was properly decided by the Board in 1970.

The harm to Western will be compounded if, after all of this, the court below is allowed to dictate to the Board that competition is required, on the route at issue, and that Continental should be selected.

We think that the Board's final decision that competitive authority is not required is legally sufficient

and should be upheld by the Court. But, if it is not, and if the case should be remanded for further action, the Board must at least have the flexibility to take into account significant changes in circumstances, which have occurred since the base year used for traffic forecasting by the Board in this case—the year ended June 30, 1971. We pointed out some of these basic changes in our Petition, pp. 24-26, and Continental has not denied them in its brief.

C. The Lower Court's Encroachment Upon the Board Functions

Continental argues (Br. pp. 13-18) that the Court below has not restricted the Board's freedom on remand. It says that the "Board was left free either to adopt or reject the decision of the Administrative Law Judge selecting Continental" (Br. p. 14); that the Board is "free to take additional evidence if it first identifies to the court the issues it wishes to explore in a further hearing" (Br. p. 16) and that there is "no indication that the court will not permit it to [take additional evidence]" (Br. pp. 16-17).

Continental's interpretations of the Court's mandate are the product of enlightened self-interest, and will not withstand even a cursory reading of the lower court's opinion.

The court found that the Board's failure to authorize competitive nonstop service between San Diego and Denver "is not in accord with the public interest considerations set forth in § 102 of the Act" (Appendix, 4a); and that "[t]he record before us contains ample evidence of the need for competiting nonstop service" (Appendix, 30a). It included a pointed suggestion that

Continental rather than any other applicant, should be awarded the authority (Appendix, 30a).

In order to maintain control of further proceedings the court directed the Board not to reopen the record for the purpose of taking additional evidence without first petitioning the court to modify its mandate. If such a petition should be filed, the court specified that the Board should set forth "with particularity the matters involved and their relationship to the desirability and feasibility of implementing competition." (Appendix p. 30a)

As to selection of carrier for the competitive authority, the court directed the Board to review the existing record and render a supplemental order either adopting the ALJ's determination that Continental should be selected "or setting forth its separate reasons for accepting or rejecting the ALJ's selection." (Appendix, 31a)

Acceptance of these instructions obviously would preclude any further hearing by the Board, even on new applications, without prior court approval. The reservation of the right to approve must contemplate the existence of the right to deny approval. We suggest that this is the very result intended by the Court.

Continental suggests that this procedural control reserved by the Court is justified by the time which has elapsed since the first phase of this case was first set down. (Br. p. 15) It supports its contention by citing *Ford Motor Company* v. *N.L.R.B.*, 305 U.S. 364, 374 (1939) and *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 655 (1954) as cases in point. A review of these two cases shows that neither of them stands for the principle for which it is cited.

The Board has twice decided within the past 8½ years that competitive service is not required in the San Diego-Denver market. In our view the substantial evidence of record supports those decisions, and the Board's findings are legally sufficient. Therefore, public policy provides a strong impetus to affirm the C.A.B.'s decision and avoid putting Western and other parties through more administrative procedures. The Board could better devote its time and energies to cases of higher priority.

On the other hand, if there are legal infirmities in the Board's decision, there is no basis in the record upon which the lower court or the Board can decide that competition is required under today's circumstances, or which carrier should be selected to provide that competition. It is particularly inappropriate for the lower court to attempt to force its decision on the merits on a Board which now has only two members who participated in the earlier decisions in this case.[1]

D. The Lower Court's Misinterpretation of the Federal Aviation Act

In answer to Western's argument that the lower court misinterpreted the Act in giving preeminence to "competition" as a policy guideline, Continental contends that the court's interpretation is the same as that consistently applied by the Board over its 38 year history. As we pointed out in our Petition (pp. 11-19) this simply is not true. In applying the "[c]ompetition to the extent necessary" policy guideline, which appears in Section 102(d) of the Act, the Board has always considered that it has the discretion to weigh competition

[1] Only Members Minetti and Timm remain, and Member Timm has resigned effective upon his replacement.

against the other public interest factors in Section 102. It has never deemed competition mandatory, especially when considered in relation to a particular route or service [2] and it has always considered general economic conditions existing at any given time as a moderating factor in competitive route cases.

In other words, the Act vests discretion in the Board to determine when and to what extent competition is necessary in the light of the other policy guidelines. The legislative history of the Act makes this clear (Petition pp. 8-11).

In fact, just 12 days after this case was argued in the court below, and five months before it was decided, the D.C. Circuit decided another C.A.B. case involving an interpretation of the very same policy statement which the Court in this case interpreted as affording preeminence to "competition".

In *United States* v. *C.A.B.*, 511 F.2d 1315 (1975) Judge Wilkie wrote for the court:

> "... it should be noted that competition is merely one of six or more factors to be considered by the Board in determining the public interest [footnote omitted]. Conceivably, in any given case, a less anticompetitive means of achieving the same result would be possible, but it might be uneconomical, less safe, or discourage development of an air transportation system properly adopted to America's future needs (to name three considerations set out in Section 102). In that event, the statute would appear to contemplate that the factor of competition could be outweighed by one or more of the other factors.
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> * * *

[2] American Export, 2 C.A.B. 16, 31 (1940).

> "Underlying this whole discussion is the fact that the entire regulatory scheme set up by the Federal Aviation Act is severely anticompetitive.
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> * * *
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> "The Department of Justice may well be dissatisfied with the balance drawn by Congress between competition and other aspects of the public interest. However, the remedy is not to seek judicial reinterpretation of statutory language that permits the Board, in an appropriate case, to override antitrust considerations, but to seek from Congress amendment of the Board's statutory charter." (511 F.2d at 1322-23)

Judge Leventhal was a member of the panel in that case and did not file a separate opinion.

We submit that Judge Wilkie's opinion properly interprets Section 102, and puts competition in its proper place among other policy guidelines. But, in any event, it is clear that the interpretation given the statutory provision in this case is directly opposed to that made in *U.S.* v. *C.A.B.* This alone points up the need for Supreme Court guidance.

Respectfully submitted,

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